76

No. _____ (1)

Supreme Court, U.S.
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In The

# Supreme Court of the United States

DAYTONA GRAND, INC.
and MILES WEISS

*Petitioners,*

v.

CITY OF DAYTONA BEACH, FLORIDA

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES
ELEVENTH CIRCUIT COURT OF APPEALS

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. What are the evidentiary standards that a litigant must meet in order to "cast direct doubt" upon a municipality's purported rationale and justification for the enactment of a law which infringes upon First Amendment speech interests following the plurality decisions of this Court in *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000), and *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002)?

2. Has the fractured opinion of this Court in *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002) allowed the secondary effects doctrine to evolve in a way which distorts time-honored legal principles of evidence and "reasonable belief" applied through traditional trial proceedings?

3. Can local governments require a performer to wear more clothing that "pasties and a g-string" where the record shows that free expression is significantly curtailed by the costume requirement?

## PARTIES TO THE PROCEEDINGS BELOW

The parties to these proceedings are listed in the caption.

## CORPORATE DISCLOSURE STATEMENT

Petitioner, Daytona Grand, Inc., has no parent corporation and no publicly held company owns 10% or more of the corporation's stock.

## TABLE OF CONTENTS

Page

QUESTIONS PRESENTED ..... i

PARTIES TO THE PROCEEDINGS BELOW..... ii

CORPORATE DISCLOSURE STATEMENT..... ii

TABLE OF CONTENTS ..... iii-iv

APPENDIX TABLE OF CONTENTS..... v

TABLE OF AUTHORITIES..... vi-xiii

OPINIONS BELOW ..... 1

STATEMENT OF JURISDICTION..... 1

CONSTITUTIONAL PROVISIONS AND ORDINANCES INVOLVED..... 2

STATEMENT OF THE CASE ..... 2-6

REASONS FOR GRANTING THE WRIT ..... 6

I. THE HIGHLY-FRACTURED NATURE OF THIS COURT'S PLURALITY OPINIONS ADDRESSING THE "SECONDARY EFFECTS" DOCTRINE HAS LED TO SIGNIFICANT CONFUSION AND CONFLICT IN THE LOWER COURTS ..... 6

II. THE LACK OF CLARITY FROM THIS COURT HAS FOSTERED A BODY OF DECISIONS THAT RENDER IT VIRTUALLY IMPOSSIBLE TO CHALLENGE A PURPORTED SECONDARY EFFECTS JUSTIFICATION FOR LAWS WHICH INFRINGE UPON PROTECTED EXPRESSION ..... 22

III. THE FRACTURED OPINIONS IN *BARNES v. GLEN THEATRE, INC.* AND *CITY OF ERIE v. PAP'S A.M.* HAVE LED LOWER COURTS TO IGNORE THE ADMONITION THAT RESTRICTIONS ON EXOTIC DANCE BE THE "BARE MINIMUM NECESSARY TO ACHIEVE THE STATE'S PURPOSE" ..... 28

CONCLUSION ..... 33

# APPENDIX

## TABLE OF CONTENTS

Opinion of the United States Court of Appeals for the Eleventh Circuit dated June 28, 2007, reported at *Daytona Grand, Inc. v. City of Daytona Beach* 490 F.3d 860 (11th Cir. (2007) ..... App. 1

Order of the United States Court of Appeals for the Eleventh Circuit Denying Petition For Rehearing and Petition for Rehearing *En Banc* dated September 7, 2007 ..... App. 65

Opinion of the District Court for the Middle District of Florida, dated January 20, 2006, reported at *Daytona Grand, Inc. v. Daytona Beach*, 410 F.Supp.2d 1173 (M.D. Fla. 2006) ..... App. 67

ORD. 81-334, Daytona Beach, codified as §10-6 of the Daytona Code of Ordinances (2001)..... App. 109

ORD. 02-496 and ORD. 03-375, Daytona Beach, codified as §§62-181 through -186 of the Daytona Code of Ordinances (2003)..... App. 112

## TABLE OF AUTHORITIES

CASES: Page

*22nd Avenue Station, Inc. v. City of Minneapolis*,
429 F.Supp.2d 1144, 1150 (D. Minn. 2006) .... 17

*5634 East Hillsborough Ave., Inc. v. Hillsborough County, Fla.*,
2007 WL 2936211, (M.D.Fla. Oct. 4, 2007) ..... 26

*Abilene Retail # 30, Inc. v. Board of Com'rs of Dickinson County, Kan.*,
492 F.3d 1164, (10th Cir. 2007),
*reh. en banc denied.*, _ F. 3d __,
2007 WL 3168273 (Oct. 25, 2007) ..... 20, 21

*Baby Dolls Topless Saloons, Inc. v. City of Dallas*,
295 F.3d 471 (5th Cir. 2002) ..... 31

*Barnes v. Glen Theatre, Inc.*,
501 U.S. 560 (1991)..... iv, 7, 23, 24, 28, 31, 33

*Ben's Bar, Inc. v. Village of Somerset*,
316 F.3d 702 (7th Cir. 2003)..... 8

*Bright Lights, Inc. v. City of Newport*,
830 F.Supp. 378, 381 (E.D. Ky. 1993) ..... 31

*BZAPS, Inc. v. City of Mankato*,
268 F.3d 603 (8th Cir. 2001), *cert. denied*,
536 U.S. 904 (2002)..... 19

*Cafe 207, Inc. v. St. Johns County*,
66 F.3d 272 (11th Cir. 1995), *cert. denied*,
517 U.S. 1156 (1996) ..... 32

*City of Chicago v. Pooh Bah Enterprises, Inc.*,
865 N.E.2d 133, (Ill. 2006), *cert. denied*
128 S.Ct. 127 (Oct. 01, 2007)..... 19

*City of Cleburne v. Cleburne Living Center*,
473 U.S. 432, 448, (1985)..... 28 n. 6

*City of Erie v. Pap's A.M.*,
529 U.S. 277 (2000) ..... i, iv, 7, 9, 10, 26, 28, 29

*City of Los Angeles v. Alameda Books, Inc.*,
535 U.S. 425 (2002) ..... *passim*

*Daytona Grand, Inc. v. City of Daytona Beach*,
410 F.Supp.2d 1173 (M.D. Fla. 2006)..... 1, 4

*Daytona Grand, Inc. v. City of Daytona Beach*,
490 F.3d 860 (11th Cir. 2007) ..... 1, 19, 21,
26, 27, 32

*Deja Vu of Nashville, Inc. v. Metropolitan
Government of Nashville and
Davidson County, Tennessee*,
274 F.3d 377 (6th Cir. 2001), *cert. denied*,
535 U.S. 1073 (2002)..... 24

*Deja Vu of Nashville, Inc. v. Metropolitan
Government of Nashville and Davidson County*,
466 F.3d 391 (6th Cir. 2006)..... 27

*DiMa Corp. v. Town of Hallie*,
185 F.3d 823 (7th Cir. 1999),
*cert. denied*, 529 U.S. 1067 (2000)..... 15, 16,
23, 24

*Doran v. Salem Inn, Inc.*,
422 U.S. 922 (1975)..... 32, 33

*Eisenstadt v. Baird*,
405 U.S. 438 (1972) ..... 28 n. 6

*Encore Videos, Inc. v. City of San Antonio*,
330 F.3d 288 (5th Cir. 2003),
*cert. denied*, 540 U.S. 982 (2003) ..... 18

*Erie Boulevard Triangle Corp. v. City of Schenectady*,
250 F.Supp.2d 22 (N.D. N.Y. 2003)..... 9 n. 1

*Essence, Inc. v. City of Federal Heights*,
285 F.3d 1272 (10th Cir. 2002),
*cert. denied*, 537 U.S. 947 (2002)..... 24

*Fantasy Ranch, Inc. v. City of Arlington, Texas*,
459 F.3d 546 (5th Cir. 2006) ..... 21, 24

*Fantasyland Video v. County of San Diego*,
373 F.Supp.2d 1094 (S.D. Cal. 2005) ..... 21, 26

*Farkas v. Miller*,
151 F.3d 900 (8th Cir. 1998) ..... 24

*Flanigan's Enterprises, Inc. v. Fulton County*,
242 F.3d 976 (11th Cir. 2001),
*cert. denied*, 536 U.S. 904 (2002) ..... 6, 9 n. 1, 13, 17 n. 3

*Gammoh v. City of La Habra*,
395 F.3d 1114 (9th Cir. 2005),
*cert. denied*, 546 U.S. 871 (2005)..... 16, 19, 21

*Giovani Carandola, Ltd. v. Bason*,
303 F.3d 507 (4th Cir. 2002)..... 11, 24

*G.M. Enterprises, Inc. v. Town of St. Joseph*,
350 F.3d 631 (7th Cir. 2003),
*cert. denied*, 543 U.S. 812 (2004)..... 21

*H And A Land Corp., v. City of Kennedale, Texas*,
480 F.3d 336 (5th Cir. 2007)..... 18

*Illusions-Dallas Private Club, Inc. v. Steen*,
482 F.3d 299, 312-315 (5th Cir. 2007) ..... 25

*ILQ Investments, Inc. v. City of Rochester*,
25 F.3d 1413 (8th Cir. 1994),
*cert. denied*, 513 U.S. 1017 (1994) ..... 18

*Kentucky v. Jameson*,
215 S.W.3d 9, 33 (Ky. 2006), *cert. denied*
128 S.Ct. 190 (Oct 1, 2007) ..... 8, 14, 23

*Kentucky Restaurant Concepts, Inc.*
*v. City of Louisville*,
209 F.Supp.2d 672 (W.D. Ky. 2002) ..... 16-17

*LLEH, Inc. v. Wichita County*,
289 F.3d 358 (5th Cir. 2002) ..... 21

*Marks v. United States*,
430 U.S. 188 (1977) ..... 8, 24

*Members of City Council of Los Angeles*
*v. Taxpayers for Vincent*,
466 U.S. 789 (1984)..... 26 n. 5

*MDK, Inc. v. Village of Grafton*,
345 F.Supp.2d 952, 962 (E.D. Wis. 2004) ..... 30

*Mitchell v. Commission on Adult Entertainment*
*Establishments of Delaware*,
10 F.3d 123 (3rd Cir. 1993)..... 24

*Peek-A-Boo Lounge of Bradenton, Inc. v. Manatee County*,
337 F.3d 1251 (11th Cir. 2003),
*cert. denied*, 541 U.S. 988 (2004) ... 4, 6, 8, 9 n. 1, 11, 14, 17 n. 3, 25, 31-32

*Red-Eyed Jack v. City of Daytona Beach*,
322 F.Supp.2d 1361 (M.D. Fla. 2004) ..... 4

*Renton v. Playtime Theatres, Inc.*,
475 U.S. 41 (1986) ..... 7, 8, 9, 11, 12, 13, 25

*R.V.S., L.L.C. v. City of Rockford*,
361 F.3d 402, 411(7th Cir. 2004) ..... 17, 29-30

*Schad v. Mount Ephraim*,
452 U.S. 61 (1981) ..... 33

*Schneider v. New Jersey*,
308 U.S. 147 (1939) ..... 26 n. 5

*SOB, Inc. v. County of Benton*,
317 F.3d 856 (8th Cir. 2003),
*cert. denied*, 540 U.S. 820 (2003) .... 9, 26, 25 n. 4

*Steverson v. City of Vicksburg, Miss.*,
900 F.Supp. 1 (S.D. Miss. 1994) ..... 30-31

*Tollis, Inc. v. San Bernardino County*,
827 F.2d 1329 (9th Cir. 1987)..... 19

*United States v. O'Brien*,
391 U.S. 367 (1968) ..... 7-8, 23, 32

*Ward v. Rock Against Racism*,
491 U.S. 781 (1989)..... 26 n. 5

*Weinberger v. Wiesenfeld*,
420 U.S. 636 (1975) ..... 28 n. 6

*White River Amusement Pub, Inc. v. Town of Hartford*,
481 F.3d 163 (2d Cir. 2007) ..... 25

*World Wide Video, Inc. v. City of Tukwila*,
816 P.2d 18 (Wash. 1991)..... 18

*World Wide Video of Wash., Inc. v. City of Spokane*,
368 F.3d 1186 (9th Cir. 2004)..... 26

*Z.J. Gifts, L.L.C. v. City of Aurora*,
136 F.3d 683 (10th Cir. 1998),
*cert. denied*, 525 U.S. 868 (1998)..... 19

**CONSTITUTIONAL PROVISIONS:**

U.S. CONST. AMEND. I ..... *passim*

U.S. CONST. AMEND. XIV ..... 12 n. 2

**STATUTES, LEGISLATIVE HISTORY, AND ORDINANCES:**

28 U.S.C. §1254(1) ..... 1

§10-6, Daytona Code of Ordinances (2001) ..... 2, 3

§§62-181 through -186
Daytona Code of Ordinances (2003) ..... 2

ORD. 81-334, Daytona Beach ..... 2, 3

ORD. 02-496, Daytona Beach ..... 2, 3

ORD. 03-375, Daytona Beach ..... 2, 3

**OTHER AUTHORITIES:**

Christopher J. Andrew, *The Secondary Effects Doctrine: The Historical Development, Current Application, and Potential Mischaracterization of an Elusive Judicial Precedent*, 54 Rutgers L. Rev. 1175, 1212 (2002) ..... 12 n. 2

Roger Enriquez, Jeffrey M. Cancino & Sean P. Varano, *A Legal and Empirical Perspective of Crime and Adult Establishments: A Secondary Effects Study in San Antonio, Texas*, 15 Am. U.J. Gender Soc. Pol'y & L. 1 (2006)..... 9 n. 1, 11 n. 2

Christy A. Fisher, *Sixth Annual Review of Gender and Sexuality Law: I. Constitutional Law Chapter: Nude Dancing*, 6 Geo. J. Gender & Law 335 (2005)..... 12 n. 2

Daniel Linz, Bryant Paul, Kenneth C. Land, Jary R. Williams & Michael E. Ezell, *An Examination of the Assumption That Adult Businesses Are Associated With Crime In Surrounding Areas: A Secondary Effects Study In Charlotte, North Carolina, 38 Law* & Society Review, No. 1 (2004) ..... 9 n. 1

Daniel Linz, Bryant Paul & Mike Z. Yao, *Peep Show Establishments, Police Activity, Public Place and Time: A Study of Secondary Effects in San Diego, California*, 43 The Journal of Sex Research 182 (2006) .... 9 n. 1

Daniel Linz, Mike Z. Yao & Sahara Byrne, *Testing Supreme Court Assumptions in California v. LaRue: Is There Justification for Prohibiting Sexually Explicit Messages in Establishments that Sell Liquor?*, 7 Communication Law Review, 23-53 (2007) ..... 9 n. 1

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported as *Daytona Grand, Inc. v. City of Daytona Beach*, 490 F.3d 860 (11th Cir. 2007) (App. 1-64). Petitioner's Petition for Rehearing *En Banc* was denied by the Eleventh Circuit on September 7, 2007. (App. 65-66). The Eleventh Circuit reversed in part and affirmed in part the decision of the United States District Court for the Middle District of Florida. The District Court opinion is reported as *Daytona Grand, Inc. v. City of Daytona Beach*, 410 F.Supp.2d 1173 (M.D. Fla. 2006) (App. 67-108).

## JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

The Eleventh Circuit Court of Appeals rendered its opinion on June 28, 2007. The Eleventh Circuit denied a timely filed Petition for Rehearing *En Banc* by order dated September 7, 2007. This petition is filed within 90 days of that date.

## CONSTITUTIONAL PROVISIONS AND ORDINANCES INVOLVED

### Constitutional provisions

The First Amendment to the Constitution of the United States of America provides that "Congress shall make no law . . . abridging the freedom of speech . . . ."

### Statutory provisions

The City of Daytona "nudity with alcohol" Ordinance was enacted as Ordinance 81-334 and is codified as §10-6 of the Daytona Code of Ordinances (2001). Section 10-6 appears at App. 109-111.

The City of Daytona "public nudity" ordinances were enacted as Ordinance 02-496 and Ordinance 03-375 and are codified as §§62-181 through -186 of the Daytona Code of Ordinances (2003). Sections 62-181 through -186 appear at App. 112-119.

## STATEMENT OF THE CASE

Petitioner Daytona Grand, Inc. owns and operates a "gentlemen's club" or cabaret known as "Lollipop's" which features live exotic dance performances in a barroom setting. Dancers perform either in pasties and G-strings, topless with G-string bottoms, or, occasionally, fully nude. The business has been in operation at the same

location since October 2000. Petitioner Miles Weiss is the principal officer of Daytona Grand and asserted his own First Amendment right to offer and enjoy exotic dance performances.

The City of Daytona Beach purports to regulate exotic dance establishments through a variety of ordinances. The Daytona Beach Land Development Code (LDC) restricts the locations where adult businesses may operate. Exotic dance is also affected by a general prohibition against public nudity. [ORD. 02-496 as amended by ORD. 03-375]. The City enacted a separate Ordinance which prescribes minimum clothing requirements for alcoholic beverage establishments. [§10-6 and ORD. 81-334]. As applied to Petitioners, the clothing requirements under both the public nudity ordinance and the nudity with alcohol ordinance amount to a conservative, full coverage bikini.

Petitioners brought an original proceeding challenging the constitutionality of the City's zoning ordinances as well as the ordinances which prohibited public nudity generally and in establishments which served alcoholic beverages [ORD. 81-334 and ORD. 02-496 as amended by ORD. 03-375). (Id.)

On December 1, 2004 the District Court upheld the constitutionality of the City's zoning code and denied Petitioners' claim that the nudity ordinances were not narrowly tailored. (R-119). Petitioners had asserted that clothing requirements in excess of pasties and g-strings were not

narrowly tailored given record evidence that the additional restrictions infringed upon speech. The zoning ruling essentially adopted the Court's position in the earlier case of *Red-Eyed Jack v. City of Daytona Beach*, 322 F.Supp.2d 1361 (M.D. Fla. 2004).

The Memorandum Opinion denied summary judgment on the challenges directed to the City's public nudity and alcohol with nudity ordinances. With respect to those challenges, the trial Court found that the Petitioners had successfully cast doubt on the validity of the City's preenactment evidence but that material issues of fact remained when the burden of proof shifted to the City to bring forward additional evidence in support of its Ordinances.

The case went to trial on the remaining issues and the Court heard testimony over six days. On January 20, 2006, the trial Court entered Judgment in favor of the Plaintiffs finding that the City's public nudity and nudity with alcohol ordinances violated the First Amendment. *See, Daytona Grand, Inc. v. City of Daytona Beach*, 410 F.Supp.2d 1173 (M.D. Fla. 2006) (App. 67-108).

The trial Court made detailed findings of fact supporting its conclusion under *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002) and *Peek-A-Boo Lounge of Bradenton, Inc. v. Manatee County, Florida*, 337 F.3d 1251 (11th Cir. 2003) that the City's legislative predicate consisted of shoddy data and that Petitioner's local studies had

shown with scientific precision that adult entertainment establishments were not associated with adverse secondary effects in this community.

The trial Judge found that "the City's pre-enactment evidence consists either of purely anecdotal evidence or opinions based on highly unreliable data." (App. 102). At trial, the City did not attempt to directly rebut the findings of Petitioners' local studies. Rather, the City offered testimony attempting to show that Petitioners' experts had used a flawed methodology. After hearing the witnesses, the trial Judge concluded that Petitioners' studies were credible, scientifically sound and dispelled any reasonable belief that the City's nudity ordinances were related in any way to the amelioration of adverse secondary effects.

Furthermore, the Court found that the City's rebuttal evidence was of the same shoddy quality and nature as its pre-enactment record: "the City fail[ed], once more, to compare any of its data of incidents occurring in and around nude dancing establishments with data of such incidents occurring in and around similarly situated establishments." (App. 105).

On appeal, a panel of the Eleventh Circuit found that the trial Judge applied an incorrect evidentiary standard. In essence the panel determined that a municipality can rebut scientific local studies conducted with statistical rigor with the same kind of anecdotal information which

would satisfy the first prong of the *Alameda Books* test:

> Rather, the City of Daytona Beach could reasonably rely upon "[c]ommon sense," "its own experiences," "the experiences of ... other cities," or city officials' local knowledge. (citations omitted).

(App. 51).

Petitioners filed a Petition for Rehearing *En Banc* citing conflict with *Peek-A-Boo Lounge, supra* and *Flanigan's Enterprises, Inc. of Georgia v. Fulton County*, 242 F.3d 976 (11th Cir. 2001). The Petition for Rehearing was denied on September 7, 2007. (App. 65-66).

This Petition follows.

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## REASONS FOR GRANTING THE WRIT

### I. THE HIGHLY-FRACTURED NATURE OF THIS COURT'S PLURALITY OPINIONS ADDRESSING THE "SECONDARY EFFECTS" DOCTRINE HAS LED TO SIGNIFICANT CONFUSION AND CONFLICT IN THE LOWER COURTS.

It is believed that this is the first case in the United States to have evaluated the "adverse secondary effects doctrine" after a full trial. In

addition to having a completely developed record, this case presents issues as to how a trial judge is to exercise his traditional authority to weigh evidence, consider the credibility of witnesses and reach a principled decision under a confusing and conflicting body of secondary effects law.

In *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), this Court declared that the enactment of zoning ordinances directed at "adult" businesses could be justified by the "secondary effects" of such establishments. These laws would be declared constitutional if they were "designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication." *Id.* at 47. Since *Renton*, the secondary effects doctrine has moved beyond the realm of zoning to encompass any ordinance affecting adult entertainment, including public nudity ordinances, special licensing laws and a host of miscellaneous regulations such as hours of operation, stage requirements and tipping restrictions.

This expansion can be tracked through a trio of plurality decisions decided by this Court: *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991); *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000) and *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002). Through these cases, it clear that the Court intends to treat adult entertainment regulations as presumptively content-neutral and subject to the intermediate scrutiny test for symbolic speech set forth in *United States v. O'Brien*, 391 U.S. 367

(1968). Under that test, a law will be upheld so long as: 1) the regulation at issue is within the government's constitutional power; 2) the regulation furthers an important or substantial governmental interest; 3) the governmental interest is unrelated to the suppression of free expression; and 4) the incidental restriction on alleged First Amendment freedom is no greater than is essential to the furtherance of that interest. *Id.* at 377.

However, beyond this general statement, all is confusion and chaos. A number of courts have devoted substantial portions of their opinions just trying to decipher what these split decisions mean under the test of *Marks v. United States*, 430 U.S. 188, 193 (1977) (the "holding" of a plurality decision "may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds"). *See, e.g., Peek-A-Boo Lounge of Bradenton, Inc. v. Manatee County*, 337 F.3d 1251, 1259-64 (11th Cir. 2003), *cert. denied*, 541 U.S. 988 (2004); *Ben's Bar, Inc. v. Village of Somerset*, 316 F.3d 702, 717-22 (7th Cir. 2003); *SOB, Inc. v. County of Benton*, 317 F.3d 856, 860-64 (8th Cir. 2003), *cert. denied*, 540 U.S. 820 (2003); and *Kentucky v. Jameson*, 215 S.W.3d 9 (Ky. 2006), *cert. denied* 128 S.Ct. 190 (Oct 1, 2007).

In practice, the issue which most divides this Court and the lower Courts is the sufficiency of the governmental interest prong. Under *Renton* and its progeny, a city or state need not conduct new studies or produce evidence independent of that

already generated by other municipalities before enacting a secondary effects-based law, "so long as whatever ***evidence*** the [government] relies upon is ***reasonably believed to be relevant*** to the problem that [it] addresses." *Renton*, 475 U.S. at 51-52 (clarification and emphasis added). But how a court determines if this standard is met is not self-apparent.

At a minimum, this Court acknowledges at least a theoretical right to dispute the factual sufficiency of the claimed government interest in regulating secondary effects.[1] In *Pap's* this Court

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[1] It must be acknowledged that there are peer-reviewed articles and judicial opinions which establish the fact that adult businesses do not invariably cause adverse secondary effects. *See, e.g., Peek-A-Boo Lounge*, 337 F.3d at 1268; *Flanigan's Enterprises*, 242 F.3d at 986; and *Erie Boulevard Triangle Corp. v. City of Schenectady*, 250 F.Supp.2d 22, 32 (N.D.N.Y. 2003); Daniel Linz, Bryant Paul, Kenneth C. Land, Jay R. Williams & Michael E. Ezell, *An Examination of the Assumption That Adult Businesses Are Associated With Crime In Surrounding Areas: A Secondary Effects Study In Charlotte, North Carolina*, 38 Law & Society Review, No. 1 (2004); Daniel Linz, Bryant Paul & Mike Z. Yao, *Peep Show Establishments, Police Activity, Public Place and Time: A Study of Secondary Effects in San Diego, California*, 43 The Journal of Sex Research 182 (2006); Daniel Linz, Mike Z. Yao & Sahara Byrne, *Testing Supreme Court Assumptions in California v. LaRue: Is There Justification for Prohibiting Sexually Explicit Messages in Establishments that Sell Liquor?*, 7 Communication Law Review, 23-53 (2007); and Roger Enriquez, Jeffrey M. Cancino & Sean P. Varano, *A Legal and Empirical Perspective of Crime and Adult Establishments: A Secondary Effects Study in San Antonio, Texas*, 15 Am. U.J. Gender Soc. Pol'y & L. 1 (2006) (non-peer reviewed published study that found no connection between crime rates and live entertainment "adult" businesses).

actually chided the litigant for not taking advantage of several opportunities to dispute the facts relied on by government in support of a public nudity law:

> Here, Kandyland has had ample opportunity to contest the council's findings about secondary effects - before the council itself, throughout the state proceedings, and before this Court. Yet to this day, Kandyland has never challenged the city council's findings or cast any specific doubt on the validity of those findings. Instead, it has simply asserted that the council's evidentiary proof was lacking.

*Pap's*, 529 U.S. at 298.

Later, in *Alameda Books*, the plurality created a burden-shifting procedure for evaluating secondary effects claims as well as the beginnings of a substantive standard to determine when each party has met its burden of proof. The initial burden on government to support it claim of content neutrality is intentionally slight. However, this Court has warned that:

> This is not to say that a municipality can get away with *shoddy data or reasoning*. The municipality's evidence must fairly support the municipality's rationale for its ordinance. If plaintiffs

> fail to ***cast direct doubt*** on this rationale, ***either by demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings***, the municipality meets the standard set forth in *Renton*.

*Alameda Books*, 535 U.S. at 438-39 (emphasis added).

The lack of a clear evidentiary standard for evaluating the validity of the secondary effects doctrine in individual communities has led to discord among the Circuits and an endless series of cases which can best be described as dysfunctional. Lower Courts seem to agree that, if there is no evidentiary record at all in support of an ordinance, the law will fail under *Alameda Books*. *See, e.g.*, *Peek-A-Boo Lounge* and *Giovani Carandola, Limited v. Bason*, 303 F.3d 507 (4th Cir. 2002). Beyond that point, the cases find no agreement and no guidance from this Court. This conflict among the Circuits is not limited to just the *weight* of evidence that is necessary to "cast direct doubt," but also the form of contradictory evidence that is even *relevant* to meeting these standards. [2]

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[2] Legal commentators have been unanimous in pointing out the near impossibility of applying these fractured opinions to actual cases. *See, e.g.*, Roger Enriquez, Jeffrey M. Cancino & Sean P. Verano, *A Legal and Empirical Perspective on Crime and Adult Establishments: A Secondary Effects Study in San Antonio, Texas*, 15 Am. U.J. Gender Soc. Pol'y & Law 1, 39 (2006) ("The post-Alameda jurisprudence makes it clear that

One of the most fundamental of these issues is the weight to be given recent local scientific studies as compared to anecdotal accounts or reports compiled many years ago in other jurisdictions which may or may not have much in common with the community at issue. In *Renton*, this Court determined that communities need not conduct their own studies, but are free to rely on "foreign" studies, case opinions and the like. However, that does not fully answer the factual questions allowed by *Alameda Books*.

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courts are struggling with the issue of 'quantum and quality' of evidence necessary to establish an association or link between sexually oriented businesses and negative secondary effects"); Christy A. Fisher, *Sixth Annual Review of Gender and Sexuality Law: I. Constitutional Law Chapter: Nude Dancing*, 6 Geo. J. Gender & Law 335 (2005) ("Restrictions on nude dancing implicate the First and Fourteenth Amendments of the U.S. Constitution. Courts have issued vague and contradictory opinions on the topic, make the conflict between constitutional protections of erotic express and public decency laws even more confusing"); and Christopher J. Andrew, *The Secondary Effects Doctrine: The Historical Development, Current Application, and Potential Mischaracterization of an Elusive Judicial Precedent*, 54 Rutgers L. Rev. 1175, 1212 (2002) ("Alameda Books (sic), on the other hand, represents a missed opportunity for the court to come to a decision on the intricacies of the secondary effects analysis, which would be useful once the Court begins applying the analysis consistently outside the area of adult entertainment regulations. It seems clear that the evidentiary burdens and legislative motivations are not entirely clear from the fractured nature of many of the recent secondary effects opinions and the different discussions and rationales that are provided throughout these opinions").

What happens, for instance, when a community has actual experience with adult entertainment establishments operating for many years and reliable data are available which show conclusively - to a scientific certainty – that those business cause no unique harms in their communities? Can foreign studies trump actual local experience measured with reliable statistics? Or put in the terms of *Renton* analysis, can foreign studies and anecdotal information ever be "reasonably believable" in light of local scientific evidence of *Daubert*-quality showing that the government's information is factually incorrect?

In *Flanigan's Enterprises, Inc. v. Fulton County*, 242 F.3d 976 (11th Cir. 2001), *cert. denied*, 536 U.S. 904 (2002), both the County and adult businesses commissioned studies which found that local adult clubs were not associated with adverse secondary effects. Nonetheless, the County passed restrictions on adult businesses based on studies from other jurisdictions, anecdotal testimony and the belief of local legislators that clubs must simply be bad for the community. The Eleventh Circuit found it was not reasonable for Fulton County to "rely on remote, foreign studies concerning secondary effects when the County's *own current, empirical data* conclusively demonstrated that such studies were not relevant to local conditions." *Id.* at 986 (emphasis added).

In contrast, the Kentucky Supreme Court expressly rejected the Eleventh Circuit's suggestion

that local studies had any particular value in evaluating secondary effects claims:

> We thus decline to adopt the rationale offered by the eleventh circuit in *Peek-A-Boo Lounge* wherein the court concluded that "the constitutionality of an ordinance will depend on local conditions." *Peek-A-Boo Lounge,* 337 F.3d at 1272 (further citation omitted).

*Kentucky v. Jameson*, 215 S.W.3d 9, 33 (Ky. 2006). The Kentucky Supreme Court went so far as to say that the ultimate truth or accuracy of the government's secondary effects evidence is irrelevant to the constitutional inquiry:

> To that we add that it is irrelevant whether the local government is actually wrong regarding the extent of all the secondary effects that have actually occurred or may occur in the future when considering its decision to regulate the sexually oriented business. Rather, the emphasis is on whether the decision to regulate is merely a pretext to suppress the freedom of expression.

*Id.* at 32.

While the result in *Jameson* should be impossible under *Alameda Books*, the Kentucky Court is not alone in rejecting the trier of fact's

traditional role of weighting evidence to establish the truth underlying secondary effects claims. *See, e.g., DiMa Corp. v. Town of Hallie*, 185 F.3d 823, 831 (7th Cir. 1999). ("DiMa's contradictory evidence would be highly probative if our task were to discover the objective truth about the effect of Pure Pleasure's operating in Hallie. But our task under the First Amendment is far different.").

In light of the conflict between the Courts over the "easy" issues, it should not be surprising that the Courts fail to agree where the facts and issues are more subtle. There is no consensus, for instance, regarding the quality or quantity of the evidence necessary to prove that the City's factual justification – whether local or foreign – amounts to "shoddy data."

The trial Court in the instant case conducted a six day trial which focused exclusively on the sufficiency of the City's secondary effects evidence and the validity of Petitioner's scientific studies which discounted Daytona's anecdotal data. The trial Judge concluded *on the facts shown at trial* that the City's preenactment evidence was shoddy and its attempt at rebuttal involved more of the same. Yet, the Eleventh Circuit found that this apparently conventional weighing of the actual evidence was entirely inappropriate in a secondary effects case. Rather, the Eleventh Circuit specifically found that a City is not required to "justify its ordinances with empirical evidence or scientific studies." (App. 48).

Several Circuits would agree with the Eleventh Circuit ruling below. *See, e.g., G. M. Enterprises, Inc. v. Town of St. Joseph, Wisconsin*, 350 F.3d 631, 635-36, 639 (7th Cir. 2003), *cert. denied*, 543 U.S. 812 (2004) (a local study which established that the surrounding county "[h]ad not experienced any major problems with adult entertainment establishments," an affidavit stating that property values near the club had increased over time, an affidavit which established that the majority of police calls regarding incidents at the club were generated during hours when no nude or semi-nude dance entertainment was offered, and a statement by the local sheriff that the volume of police calls generated by the club was unrelated to nude dancing, were all irrelevant because "*Alameda Books* does not require a court to re-weigh the evidence considered by a legislative body"); *DiMa Corp. v. Town of Hallie*, 185 F.3d 823, 831 (7th Cir. 1999), *cert. denied*, 529 U.S. 1067 (2000) (the district court "properly rejected" expert testimony and other evidence demonstrating that there was no correlation between the plaintiff's establishment being open 24 hours a day and crime because it "merely contradicts other evidence that the Hallie Board could have reasonably relied upon"); *Gammoh v. City of La Habra*, 395 F.3d 1114, 1126 (9th Cir. 2005), *cert. denied*, 126 S.Ct. 374 (2005) (Ninth Circuit ignored proffered expert testimony that the studies on which the city relied were "flawed and irrelevant" and did not conform to the methodological criteria suggested by the appellants' expert, as that was "simply not the law"), and *Kentucky Restaurant Concepts, Inc. v. City of Louis-*

*ville*, 209 F.Supp.2d 672, 679-80 (W.D. Ky. 2002) (evidence challenging the reliability and probity of the reports upon which the city relied, empirical studies conducted in other municipalities that found no connection between adult uses and adverse secondary effects, and compilation of police data showing no local increase in crime, did not disprove theory that ordinance may reduce criminal activity).

Other Circuits would clearly come to a different result.[3] *See, e.g., R.V.S., L.L.C. v. City of Rockford*, 361 F.3d 402, 411 (7th Cir. 2004) ("While it is true that common experience may be relied upon to bolster a claim that a regulation serves a current governmental interest, the experience in this case falls short of satisfying the minimal evidentiary showing required by *Alameda Books*. Indeed, while courts may credit a municipality's experience, such consideration cannot amount to an acceptance of an 'if they say so' standard."); *22nd Avenue Station, Inc. v. City of Minneapolis*, 429 F.Supp.2d 1144, 1150 (D. Minn. 2006) ("Plaintiff has presented sufficient evidence to cast direct doubt on the City's rationale. It has submitted both an expert affidavit and a peer-reviewed study casting grave doubt on the reliability of the foreign studies upon which the City relied. It has submitted its own recent expert

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[3] Indeed, the panel decision in this case is impossible to reconcile with other decisions from the Eleventh Circuit that either required or contemplated an evidentiary showing at trial. *Compare, Peek-A-Boo Lounge* and *Flanigan's Enterprises*.

analysis of Plaintiff's impact on crime, property values, and blight in its surrounding neighborhood, which shows that Plaintiff has not caused the secondary effects that the City seeks to combat. The City has provided no contrary evidence regarding the impact of 22nd Avenue Station on its neighborhood.").

Further divisions appear all across the country on every issue related to secondary effects proofs. For example, the Courts split over whether the generally relied-upon secondary effects reports examining adult bookstores and live entertainment venues can be used to justify regulations of "take-out" only facilities where there is no viewing of adult entertainment on the premises. *Cf. Encore Videos, Inc. v. City of San Antonio*, 330 F.3d 288, 293-95 (5th Cir. 2003), *cert. denied*, 540 U.S. 982 (2003), and *World Wide Video, Inc. v. City of Tukwila*, 816 P.2d 18, 21 (Wash. 1991), *cert. denied*, 503 U.S. 986 (1992) (they cannot); *with H And A Land Corp., v. City of Kennedale, Texas*, 480 F.3d 336, 339341 (5th Cir. 2007) (note that it distinguishes the same circuit decision in *Encore Videos*); *Z.J. Gifts, L.L.C. v. City of Aurora*, 136 F.3d 683, 687 (10th Cir. 1998), *cert. denied*, 525 U.S. 868 (1998), and *ILQ Investments, Inc. v. City of Rochester*, 25 F.3d 1413, 1418 (8th Cir. 1994), *cert. denied*, 513 U.S. 1017 (1994) (they can).

There is even a conflict among the circuits on an issue as seemingly narrow as whether secondary effects can justify a government interest in regulating a *single* instance of expressive nudity.

*Compare, BZAPS, Inc. v. City of Mankato*, 268 F.3d 603, 606-07 (8th Cir. 2001), *cert. denied*, 536 U.S. 904 (2002) (they can); *with Tollis, Inc. v. San Bernardino County*, 827 F.2d 1329, 1333 (9th Cir. 1987) (they cannot).

This utter confusion has led two appellate courts to recently state that they simply "will not specify the methodological standards to which [a litigant's] evidence must conform" in order to successfully challenge the stated secondary effects basis for the enactment of a speech-restrictive law. *See, Gammoh v. City of La Habra*, 395 F.3d 1114, 1127 (9th Cir. 2005); *City of Chicago v. Pooh Bah Enter., Inc.*, 865 N.E.2d 133, 159, (Ill. 2006), *cert. denied,* 128 S.Ct. 127 (Oct. 01, 2007). Due process requires that litigants know the burden of proof to which they are held. Without clear guidance from this Court, a trial under the *Alameda* standard has been reduced to the level of a Kafka novel.

This conflict among the Circuits may be best seen in comparing the last three decisions issued by Circuit Courts on this subject. In the instant case, we have already examined the Eleventh Circuit's treatment of an expert opinion by Daniel Linz finding that Daytona Beach's anecdotal evidence was shoddy and at odds with actual local conditions determined through scientific studies. In short, the Court found that those local scientific studies were insufficient to overcome "common sense", the experiences of other cities and "city officials' local knowledge". (App. 50-51).

The next decision in terms of chronological order is *Abilene Retail # 30, Inc. v. Board of Com'rs of Dickinson County, Kan.*, 492 F.3d 1164, (10th Cir. 2007), *reh. en banc denied.*, __ F. 3d __, 2007 WL 3168273 (Oct. 25, 2007). In that case, the Tenth Circuit determined that a methodologically similar scientific study *conducted by the same expert, Dr. Linz*, was sufficient to cast doubt on the local government's secondary effects and mandated denial of the County's motion for summary judgment. It is noteworthy too that the Court was concerned with the lack of empirical information in support of the adult entertainment ordinance – a point entirely discounted by the Eleventh Circuit in the instant case.

It is also noteworthy that the Tenth Circuit was entirely aware of the fact that it reached a decision contrary to that of other Circuits. In the reported *en banc* decision, a dissenting judge specifically emphasized the fact that the Circuits were irreconcilably split:

> Legally, the significance of this case is illustrated by the fact that it opens not one, but two, splits with our sister circuits on important questions of law concerning the amount of judicial deference due legislative judgments. First, the panel opinion sets a new and much higher burden for municipalities under *Alameda Books* Step 1 than has any other circuit court, and in the process creates a

> circuit split with the Fifth Circuit. *See* Concurrence Part I; Maj. Op., 492 F.3d at 1175 n. 10 (discussing *LLEH, Inc. v. Wichita County*, 289 F.3d 358 (5th Cir. 2002)). (footnote omitted). Second, unlike our sister circuits which afford substantially more judicial deference to legislative judgments, the concurrence's treatment of *Alameda Books* Steps 2 and 3 effectively allows a jury to "veto" legislation whenever it concludes, by a preponderance of the evidence (that is, >= 50.0001%), that the legislature's chosen path is erroneous. *Compare* Concurrence Parts II & III *with Daytona Grand, Inc. v. City of Daytona Beach, Fla.*, 490 F.3d 860, 881 (11th Cir. 2007), *G.M. Enters., Inc. v. Town of St. Joseph, Wisc.*, 350 F.3d 631, 639 (7th Cir. 2003), *Gammoh v. City of La Habra*, 395 F.3d 1114, 1126 (9th Cir. 2005), *and Fantasy Ranch*, 459 F.3d at 561.

*Abilene Retail*, _ F. 3d __, 2007 WL 3168273 at *1.

Finally, on October 15, 2007, the Ninth Circuit released its opinion in *Fantasyland Video, Inc. v, County of San Diego*, __F.3d ___, 2007 WL 2983710 (9th Cir. 2007) holding that an adult business had failed to rebut the government's reliance on "traffic and noise" thought to be

associated with adult businesses. There was no actual evidence that adult businesses generated traffic or noise different in kind or quality that any other kind of business in the community. Nonetheless, the mere recitation of those theoretical problems was held sufficient to infringe speech interests.

This Court has developed a confusing body of precedent affecting important First Amendment interests in communities throughout this country. The three plurality opinions addressing the issue of secondary effects have metamorphosed into a hydra with a different head arising in every Circuit. That monster should be slain through a coherent opinion that once again brings order to the law.

## II. THE LACK OF CLARITY FROM THIS COURT HAS FOSTERED A BODY OF DECISIONS THAT RENDER IT VIRTUALLY IMPOSSIBLE TO CHALLENGE A PURPORTED SECONDARY EFFECTS JUSTIFICATION FOR LAWS WHICH INFRINGE UPON PROTECTED EXPRESSION.

One does not have to be cynic to understand that the prevailing chaos in secondary effects theory gives local governments a potent weapon to censor and eliminate exotic dance. Adult entertainment cases are one of the few areas of constitutional jurisprudence where the Courts are willing to be deferential to legislative judgments.

However, a number of Courts have gone past deference and embraced abject fealty. Something is seriously wrong when our Courts proclaim that the *truth* simply does not matter any longer in these types of challenges. *See, Jameson*, 215 S.W.3d at 32 ("... it is *irrelevant* whether the local government is *actually wrong* regarding the extent of all the secondary effects...". that have actually occurred or may occur in the future") (emphasis added); *See also DiMa Corp.*, 185 F.3d at 831 ("*DiMa*'s contradictory evidence would be highly probative *if our task were to discover the objective truth...).* (emphasis and added).

In curtailing fundamental freedoms, how can truth ever be irrelevant? If truth is irrelevant, there can be no justice. If there is no justice, then the judicial branch of government has no purpose.

This judicial trend, resulting from the fractured nature of the Court's "secondary effects" rulings, is now rendering the second prong of *O'Brien* virtually meaningless in many jurisdictions. While none of the Circuits are especially solicitous when it comes to protecting exotic dance, some adhere more closely than others to this Court's pronouncements.

A two-fold split has arisen among the Circuits on the issues of *when* we consider the adequacy of secondary effects evidence and the *quality* of that evidence. This split occurred, in great measure, because of the highly-fractured nature of *Barnes* and the fact that Justice Souter's concurrence is

generally considered to be the "holding" of that decision.

In Justice Souter's view, a governmental interest need not be identified at the time of the enactment of a regulation, but may be established later during litigation. *Barnes*, 501 U.S. at 582 ("Our appropriate focus is not an empirical enquiry into the actual intent of the enacting legislature, but rather the existence or not of a *current* governmental interest in the service of which the challenged application may be constitutional") (Souter, J., concurring) (emphasis added).

Utilizing *Marks*, a number of courts adopt this precept. *See, e.g., Deja Vu of Nashville, Inc. v. Metropolitan Government of Nashville and Davidson County, Tennessee*, 274 F.3d 377, 394 n. 4 (6th Cir. 2001), *cert. denied*, 535 U.S. 1073 (2002) (A novel justification for a license disclosure provision was embraced by the appellate court even though it was not among the "codified" reasons for that requirement in the challenged ordinance); *See also Mitchell v. Comm'n on Adult Entertainment Establishments of Delaware*, 10 F.3d 123, 136-37 (3rd Cir. 1993); *Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 515 (4th Cir. 2002); *Fantasy Ranch, Inc. v. City of Arlington, Texas*, 459 F.3d 546, 560 (5th Cir. 2006); *DiMa Corp.*, 185 F.3d at 829-30; *Farkas v. Miller*, 151 F.3d 900, 905 (8th Cir. 1998); *Essence, Inc. v. City of Federal Heights*, 285 F.3d 1272, 1284-285 (10th Cir. 2002), *cert. denied*, 537 U.S. 947 (2002).

Other courts, however, come to the conclusion that in order for a speech-restrictive law to be upheld, the secondary effects record must be made at the time of legislative enactment (in view of *Renton*'s command that the government must "rely" upon evidence reasonably believed to be relevant to the problems that it is attempting to address). *See, e.g., White River Amusement Pub, Inc. v. Town of Hartford*, 481 F.3d 163, 171-172 (2d Cir. 2007), and cases cited therein; *Peek-A-Boo Lounge* 337 F.3d at 1267 ("This Court has held that *Renton* requires at least *some* pre-enactment evidence."); *Illusions-Dallas Private Club, Inc. v. Steen*, 482 F.3d 299, 312-315 (5th Cir. 2007).

Accordingly, in those jurisdictions that allow post-enactment secondary effects substantiation, a litigant can appropriately "cast doubt upon" those secondary effects articulated in a bill's legislative preambles but nevertheless find himself losing the constitutional challenge when a novel secondary effect is used in court for the first time to justify the law. This affords an opportunity for both government and deferential courts to come up with justifications that would strain the reasonable beliefs of even the most credulous of legislators. This is the most likely explanation for secondary effects findings such as **tax evasion and fraud** [*SOB, Inc.*, 317 F.3d at 862-63],[4] **litter** [*World Wide*

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[4] There appears to have been no evidence that problems with tax evasion and fraud were ever actually considered by the local government. Rather, the appeals court appears to have found this justification buried in the record as part of an

*Video of Wash. Inc. v. City of Spokane*, 368 F.3d 1186, 1190, 1195 (9th Cir. 2004)][5] and **traffic and noise**. [*Fantasyland Video*, 2007 WL 2983710 (9th Cir. 2007) holding that an adult business had failed to rebut the government's reliance on "traffic and noise".

The lack of clarity from this Court on these issues has led to a point where there appears to be little or no scrutiny given to whether an articulated governmental problem can truly be tied to "adult" entertainment, and that, irrespective of this Court's comments in *Pap's* and *Alameda Books*, there really is no ability to challenge the mere *assertion* of the governmental interest of adverse secondary effects.

The culmination of this judicial trend was reached in two recent cases. In *5634 East Hillsborough Ave., Inc. v. Hillsborough County, Fla.*, 2007 WL 2936211, (M.D.Fla. Oct. 4, 2007), a District Judge, expanding on the *Daytona Grand* decision, determined that a litigant can never overcome the government's record as long as there is any evidence – no matter the quality:

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extra-judicial statement given by an anonymous employee in a different state. *Id.*, at 863, n. 3.

[5] One would have expected some deference to prior decisions of this Court casting doubt upon problems with "litter" being a basis to suppress expression. *See Schneider v. New Jersey*, 308 U.S. 147, 162 (1939); *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 808-09 (1984); and *Ward v. Rock Against Racism*, 491 U.S. 781, 800 n. 7 (1989).

> This cannot be accomplished, however, by simply providing reports and testimony reaching a contrary conclusion such as those prepared and given by Drs. Danner, Fisher, and Hanna, and Mr. Schauseil, all experts retained by the Plaintiffs. (footnote omitted) *Daytona Grand* made it clear that given the existence of different conclusions based on studies, either empirical or anecdotal, the Court may not substitute its judgment for the Board.

*Id.* at *7. This trend has reached its zenith in *Deja Vu of Nashville, Inc. v. Metropolitan Government of Nashville & Davidson County*, 466 F.3d 391, 398 (6th Cir. 2006), *cert. denied*, 127 S.Ct. 2088 (2007), where the adult businesses were precluded from even seeking discovery regarding secondary effects.

This is the direction in which courts are now heading in light of the fractured nature of this Court's opinions on these issues, where the claim of adverse secondary effects being the justification for the enactment of speech-restrictive laws becomes irrefutable, irrebutable, and incontestable. Under many of the opinions issued by the Circuits, intermediate scrutiny has become indistinguishable from rational basis review as both sustain legislation based on rank speculation divorced from any semblance from truth – even when the truth can be ascertained to a scientific certainty based on

actual data.[6] This could not have been what this Court contemplated in *Pap's* and *Alameda Books*, and the petition should therefore be granted.

## III. THE FRACTURED OPINIONS IN *BARNES v. GLEN THEATRE, INC.* AND *CITY OF ERIE v. PAP'S A.M.* HAVE LED LOWER COURTS TO IGNORE THE ADMONITION THAT RES-TRICTIONS ON EXOTIC DANCE BE THE "BARE MINIMUM NECESSARY TO ACHIEVE THE STATE'S PURPOSE".

This Court has specifically addressed public nudity laws on two occasions: in *Barnes v. Glen Theatre, Inc.* and *City of Erie v. Pap's A.M.* In each case, the Supreme Court upheld laws that were construed to require no more than pasties and g-strings. In addressing the nudity law at issue in

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[6] It could be argued that blind deference to local legislators in the face of evidence that a secondary effects justification is factually untrue, is *less* stringent than review under the rational basis test. *Compare, City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 448, (1985) (Striking a law as irrational because "mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases for [discriminating]"); *Weinberger v. Wiesenfeld* , 420 U.S. 636, 648, (1975) ("[T]he mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme."); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (Contraception laws aimed at unmarried persons were irrational where facts showed that the asserted justifications were implausible).

*Pap's*, Justice O'Connor took special care to note that pasties and G-strings satisfy the asserted government interest while posing only a minimal infringement on First Amendment rights:

> The ordinance regulates conduct, and any incidental impact on the expressive element of nude dancing is *de minimis*. The requirement that dancers wear pasties and G-strings is a minimal restriction in furtherance of the asserted government interests, and the restriction leaves ample capacity to convey the dancer's erotic message.

529 U.S. at 301, 120 S.Ct. at 1390. To put matters simply, the government interest in prohibiting public nudity is met as soon as a performer is no longer nude; a dancer wearing pasties and g-strings is not nude.

While this Court has, perhaps, hinted that the minimal burden of pasties and g-strings is also the maximum extent of government authority to regulate, it has not expressly said so. In the absence of firm direction from this Court, the Circuits have split on the issue.

In *R.V.S., L.L.C. v. City of Rockford*, 361 F.3d 402, 412 (7th Cir. 2004) the Seventh Circuit declared that an ordinance which regulated clothed performers as well as fully nude performers was

not narrowly tailored and could not survive intermediate scrutiny:

> Under a narrow reading, the Ordinance regulates all persons performing an erotic dance (or other specified movements) at a business establishment while wearing more or less the equivalent of short shorts and, if female, an opaque bra. (footnote omitted). While understandably aimed at entertainers of a more "adult" persuasion, there exists the potential that mainstream performances could fall under the purview of the Ordinance. Simply, Rockford has not presented justification why it is essential to regulate such a wide universe of dance.
>
> ...
>
> Without further direction from the Supreme Court, we cannot constitutionally lower the already modest evidentiary hurdle for justifying regulations of sexually explicit but non-obscene speech on secondary effects grounds...

*Id.* at 413, 415. *See, also, MDK, Inc. v. Village of Grafton*, 345 F.Supp.2d 952, 962 (E.D. Wis. 2004) ("The 'legitimate sweep' of such sections is their application to establishments in which dancers appear nude or in pasties and G-strings."); *Steverson v. City of Vicksburg, Miss.*, 900 F.Supp. 1,

11 -12 (S.D. Miss. 1994) (Holding that *Barnes* limits clothing restrictions to pasties and G-strings).

Other Circuits have analyzed exactly the same decisions from this Court and have concluded that government is free to require more clothing than the bare minimum. *See, e.g., Baby Dolls Topless Saloons, Inc. v. City of Dallas*, 295 F.3d 471 (5th Cir. 2002); *Bright Lights, Inc. v. City of Newport*, 830 F.Supp. 378, 381 (E.D.Ky. 1993) ("bathing suit" requirement on business establishment premises furthered city's reform goals).

The height of judicial schizophrenia is reached in the Eleventh Circuit where the Court appears to have reached both conclusions from separate panels without any attempt at reconciliation through *en banc* review. In *Peek-A-Boo Lounge* the Eleventh Circuit strongly suggested that it would not allow any restrictions greater than pasties and g-strings – at least where there was a record showing that the additional clothing interfered with expression:

> Nevertheless, we find it difficult to conclude on this record that preventing erotic dancers from wearing G-strings, thongs, pasties and the like has only a "de minimis" effect on the expressive component of erotic dancing or "leaves ample capacity to convey the dancer's erotic message." Id. On the contrary, because erotic

> dancers in Manatee County are not "free to perform wearing pasties and G-strings," id., arguably, the County's prohibition could significantly impact that message.

*Peek-A-Boo Lounge*, 337 F.3d at 1273-1274. That same panel suggested that earlier case of *Cafe 207, Inc. v. St. Johns County*, 66 F.3d 272 (11th Cir. 1995), which had upheld a "bikini law" against overbreadth and narrow tailoring challenges, was no longer good law. *See*, *Peek-A-Boo Lounge*, 337 F.3d at 1274, n. 23.

Whatever clarity *Peek-A-Boo Lounge*, may have brought to this issue was utterly lost in the instant case where the *Daytona Grand* panel found that bikini regulations were lawful as long as less restrictive dancing was allowed at some locations in the community:

> [B]oth the requirement that dancers wear G-strings and pasties in all adult theaters, and the additional requirement of clothing somewhat more modest (footnote omitted) within 500 feet of establishments that serve alcohol, are narrowly tailored under *O'Brien*.

The issue of what adult citizens are permitted to wear without threat of incarceration is not a trivial one. It has commanded the attention of this Court on several occasions. *See, e.g.*, *Barnes*, *Paps*, *Doran*

*v. Salem Inn, Inc.*, 422 U.S. 922 (1975); *Schad v. Mount Ephraim*, 452 U.S. 61 (1981). Unfortunately, the plurality opinions issued by the Court have not provided sufficient guidance on these basic First Amendment principles and the Circuits have lost their way amid a morass of conflicting opinions.

## CONCLUSION

The conflict among the Circuits over these important First Amendment issues can only be resolved by a clear and comprehensive decision from this Court. For all of the foregoing reasons, Petitioners respectfully request that the Supreme Court grant review of this matter.

DATED: December 6, 2007

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* Application to the Supreme Court Bar pending.

# APPENDIX

United States Court of Appeals, Eleventh Circuit.

DAYTONA GRAND, INC., a Florida corporation doing business as Lollipop's Gentlemen's Club, Miles Weiss, Plaintiffs-Appellants Cross-Appellees,
v.
CITY OF DAYTONA BEACH, FLORIDA, a municipal corporation, Defendant-Appellee Cross-Appellant.
**No. 06-12022.**

June 28, 2007

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Anthony Angelo Garganese, Brown, Salzman, Weiss & Garganese, P.A., Orlando, FL, for Florida League of Cities, Inc., Amicus Curiae.

James Michael Johnson, Alliance Defense Fund of Louisiana, Shreveport, LA, for Citizens for Community Values, Amicus Curiae.

Appeals from the United States District Court for the Middle District of Florida.

Before HULL and MARCUS, Circuit Judges, and BARZILAY,[FN*] Judge.

FN* Honorable Judith M. Barzilay, Judge, United States Court of International Trade, sitting by designation.

MARCUS, Circuit Judge:
At issue today is the constitutionality of several zoning and public nudity ordinances adopted by the City of Daytona Beach ("the City") to regulate adult theaters. The owners and operators of Lollipop's Gentlemen's Club ("Lollipop's"), an adult theater in Daytona Beach, sued the City claiming that these ordinances violate the First Amendment. The district court upheld the zoning ordinances, finding that the City had provided a constitutionally sufficient number of available sites for adult theaters, and also denied Lollipop's claim that it was "grandfathered in" under Florida law. However, the district court struck down the nudity ordinances, concluding that they did not further the substantial government interest in reducing negative secondary effects associated with adult theaters.

After thorough review, we affirm the district court's determination that the zoning ordinances pass constitutional muster, as well as its ruling that, under Florida law, Lollipop's is not entitled to grandfather status. But as for the nudity

ordinances, we conclude that the City has indeed carried its evidentiary burden of establishing their constitutionality because the ordinances further substantial government interests, and, accordingly, we reverse and remand for further proceedings consistent with this opinion.

I. *Background*

*A. Zoning Ordinances*

In 1981, after years of increasing urban blight and economic decline, the City of Daytona Beach adopted various zoning ordinances in an effort to reduce the perceived secondary effects of adult businesses by limiting the locations where they could open and operate.[FN1] Among other things, the zoning ordinances permitted adult theaters[FN2] to open only in the City's Business Automotive ("BA") zoning districts, and even there prohibited them from locating within certain distances of churches, schools, parks, playgrounds, or other adult businesses.[FN3]

FN1. *See* Daytona Beach, Fla., Ordinance 81-292 (Sept. 16, 1981); *see also* Daytona Beach, Fla., Ordinance 82-67 (Feb. 17, 1982) (amending the definition of "adult theater").

FN2. The zoning ordinances define "adult theater," in relevant part, as "[a] use which exhibits any motion picture, exhibition, show, live show, representation, or other presentation which, in whole or in part, depicts nudity, sexual conduct,

[or] sexual excitement." Daytona Beach, Fla., Ordinance 82-67 § 1 (Feb. 17, 1982), *codified at* Daytona Beach, Fla., Land Dev.Code art. II, § 3.1 (2001).

FN3. Ordinance 81-292 added new provisions to and amended existing provisions of the City's zoning ordinances then in effect in order "[t]o reduce the adverse impacts of adult bookstores and adult theaters upon the City's neighborhoods." Ordinance 81-292 § 4. The Ordinance added definitions for "adult theater" and "adult bookstore," amended various provisions of the existing zoning ordinances for consistency, and, most importantly, added new sections to limit the locations where these adult businesses could open and operate. Those sections provided:

51.2.1 Adult bookstores and adult theaters shall be permitted as a matter of right in BA, BA-1, and BA-2 Districts. These adult uses shall not pyramid into or be allowed within the BW Districts.

51.2.2 It shall be unlawful to locate any adult theater and adult bookstore within 400 feet of any area of the City zoned R-1aa, R-1a, R-1a(1), R-1b, R-1c, R-2, R-2a, RA, R-2b, RP, R-3, PUD, T-1 or T-2.

51.2.3 It shall be unlawful to locate any adult bookstore and adult theater within 1,000 feet of any other such adult bookstores or adult theaters.

51.2.4 It shall be unlawful to locate any adult bookstore and adult theater within 400 feet of any church, school, public park or playground, or any other public or semi-public place or assembly where

large numbers of minors regularly travel or congregate.
51.2.5 Distances in 51.2.3 and 51.2.4 shall be measured from property line to property line, without regard to the route of normal travel.
Ordinance 81-292 § 4. The Ordinance also limited adult businesses' use of outside advertising signs, prohibited them from painting their buildings in "garish colors," and required that all windows and doors be "blacked or otherwise obstructed" to block visibility of the inside from outside. *Id.*

In the mid-1980s, the zoning ordinances were challenged on various grounds in *Function Junction, Inc. v. City of Daytona Beach*, 705 F.Supp. 544 (M.D.Fla.1987), *aff'd*,864 F.2d 792 (11th Cir.1988) (table). Gerald Langston, the City's Director of Planning and Redevelopment and a key participant in formulating the zoning ordinances, testified in that case as an expert in urban planning and about the legislative process that led to their enactment. Langston said that, before enacting the zoning ordinances, the City had conducted a local study of urban blight and decay that identified two blighted areas: the old downtown and the beachside. Langston explained that the identification of these areas as blighted was based on characteristics such as: "a significant percentage of deteriorating structures; a large number of small ... lots, which did not allow cars; a notable parking problem; a high incidence of crime, particularly, on the beachside; and a large percentage of antiquated, underground utility systems, such as drainage, water and sewer

systems." *Id.* at 547. Langston testified that the blight deterred investment-hotel development ceased in 1975, and in the late 1970's, Daytona Beach was denominated the "City of Sleaze." *Id.*

Langston explained that the City of Daytona Beach then created a Redevelopment Design and Review Board to deal with the blight problem. *Id.* Langston worked with the Board and testified that it "considered studies of blight in Boston and Detroit by the American Society of Planning Officials in 1979-1980. These studies show strong evidence that the central location of adult uses, like the 'Combat Zone' in Boston, causes the blighted area to grow and creates blight in fringe areas." *Id.* Langston also opined, "[b]ased upon his education, experience, knowledge of blight in Daytona Beach and his participation in drafting the subject ordinance," that live nude and seminude entertainment businesses "promote and perpetuate urban decay" and that "adult businesses have impacted on crime in the area surrounding Daytona Beach." *Id.*

David Smith, an assistant state attorney who had prosecuted drug and prostitution offenses in Daytona Beach, also testified that " 'most definitely' there were more drug and prostitution offenses in topless bars than in other bars." *Id.* at 548. Based in part on this testimony by Langston and Smith, the district court in *Function Junction* upheld the zoning ordinances. *Id.* at 552.

In 1993, the City enacted several amendments to the zoning ordinances that, among other things, required adult theaters to obtain pre-approval from a Technical Review Committee before being able to open and operate in the BA districts. In a First Amendment challenge brought by several adult theaters, the United States District Court for the Middle District of Florida entered a preliminary injunction preventing the City from enforcing the 1993 amendments because, the court found, the plaintiffs were likely to prevail at trial on their claims. *Red-Eyed Jack, Inc. v. City of Daytona Beach*, 165 F.Supp.2d 1322, 1330 (M.D.Fla.2001) [hereinafter *Red-Eyed Jack I*].

While the *Red-Eyed Jack* litigation was still pending, the City amended its zoning ordinances still again to eliminate the constitutional infirmities identified by the district court.[FN4] Relevant here, the City once again allowed adult theaters to open in the BA districts without pre-approval.[FN5] The City also created a new zoning district category, the M-5 Heavy Industrial Zoning District ("M-5"),[FN6] and ultimately applied it to 210 acres in the western part of the City.[FN7] Within this new M-5 district, adult theaters were permitted to open without the distance requirements that applied in BA districts. Although the M-5 district consisted mostly of undeveloped land, the City ensured that telephone and power lines were installed in the district's interior, the county paved a previously dirt road through it, and the City approved a preliminary plat for a fifty-five-acre subdivision straddling that road.[FN8] As a result of

these changes, the district court concluded that the zoning ordinances were constitutional. *Red-Eyed Jack, Inc. v. City of Daytona Beach*, 322 F.Supp.2d 1361, 1362 (M.D.Fla.2004) [hereinafter *Red-Eyed Jack II*]. The court found that twenty-four new sites were available in the M-5 district and that, in concert with one site already found to be available in the BA district, this created a constitutionally sufficient number of sites for the ten adult businesses that were operating or seeking to operate in Daytona Beach at that time. *Id.* at 1375.

FN4. Daytona Beach, Fla., Ordinance 01-367 § 1 (Sept. 5, 2001). Ordinance 01-367 enacted the substantive provisions that are currently in force in the BA districts:

Adult bookstores and adult theaters are permitted as of right in BA districts. The purpose of the conditions is to reduce the adverse impacts of adult bookstores and adult theaters upon neighborhoods by avoiding the concentration of uses which cause or intensify physical and social blight; improving visual appearance of adult uses; reducing negative impacts of adult uses upon other business uses, neighborhood property values, residential areas, and public and semi-public uses; insuring that adult uses do not impede redevelopment and neighborhood revitalization efforts; and avoiding adult uses in heavily used pedestrian areas. The following conditions must be met:

(a) It shall be unlawful to locate any adult bookstore or adult theater within 400 feet of any residential, R-PUD, T-1, or T-2 district.

(b) It shall be unlawful to locate any adult bookstore or adult theater within 1,000 feet of any other adult theater or adult bookstore.
(c) It shall be unlawful to locate any adult bookstore or adult theater within 400 feet of any church, school, public park, or playground, or any other public or semi-public place of assembly where large numbers of minors regularly travel or congregate.
(d) Distances shall be measured from property line to property line, without regard to the route of normal travel.
(e) Outside advertising shall be limited to one identification sign, not to exceed 20 square feet. Advertisements, displays, or other promotional materials shall not be shown or exhibited to be visible to the public from a pedestrian sidewalk or walkway or from other public or semi-public areas; and such displays shall be considered signs.
(f) Buildings shall not be painted in garish colors or such other fashion as will effectuate the same purpose as a sign. All windows, doors, and other apertures shall be blacked or otherwise obstructed so as to prevent viewing of the interior of the establishment from without.
Daytona Beach, Fla., Land Dev.Code art. XI, § 3.2 (2001).

FN5. The distance requirements between adult theaters and churches, schools, parks, playgrounds, and other adult businesses remain in effect.

FN6. Daytona Beach, Fla., Ordinances 01-456 & 01-457 (Oct. 17, 2001).

FN7. Initially, the City zoned twenty acres as M-5, but after the district court entered still another injunction based on its finding that the City still did not provide a sufficient number of sites where adult theaters could open and operate, the City zoned as M-5 an additional 190 acres adjacent to the original twenty acres. Daytona Beach, Fla., Ordinance 03-195 (May 7, 2003); *see also* *Red-Eyed Jack, Inc. v. City of Daytona Beach*, 322 F.Supp.2d 1361, 1364-65 (M.D.Fla.2004).

FN8. Daytona Beach, Fla., Ordinance 03-196 (May 7, 2003).

*B. Nudity Ordinances*

In conjunction with the zoning ordinances adopted in 1981, the City enacted Ordinance 81-334 to prohibit nudity and sexual conduct in establishments that serve alcohol.[FN9] Specifically, in any establishment that deals in alcoholic beverages, Ordinance 81-334 prohibits: the "expos[ure] to public view [of a] person's genitals, pubic area, vulva, anus, anal cleft or cleavage or buttocks"; the "expos[ure] to public view [of] any portion of [a woman's] breasts below the top of the areola"; a wide variety of sexual activities; and any "simulation" or "graphic representation, including pictures or the projection of film, which depicts" any of the conduct prohibited by the Ordinance. In addition, Ordinance 81-334 provides that no person "maintaining, owning, or operating an

establishment dealing in alcoholic beverages shall suffer or permit" any of the proscribed conduct.

FN9. In relevant part, Ordinance 81-334 provides:
(a) No person shall expose to public view such person's genitals, pubic area, vulva, anus, anal cleft or cleavage or buttocks or any simulation thereof in an establishment dealing in alcoholic beverages.
(b) No female person shall expose to public view any portion of her breasts below the top of the areola or any simulation thereof in an establishment dealing in alcoholic beverages.
(c) No person maintaining, owning, or operating an establishment dealing in alcoholic beverages shall suffer or permit any person to expose to public view such person's genitals, pubic area, vulva, anus, anal cleft or cleavage or buttocks or simulation thereof within the establishment dealing in alcoholic beverages.
(d) No person maintaining, owning, or operating an establishment dealing in alcoholic beverages shall suffer or permit any female person to expose to public view any portion of her breasts below the top of the areola or any simulation thereof within the establishment dealing in alcoholic beverages.
(e) No person shall engage in and no person maintaining, owning, or operating an establishment dealing in alcoholic beverages shall suffer or permit any sexual intercourse; masturbation; sodomy; bestiality; oral copulation; flagellation; sexual act which is prohibited by law; touching, caressing or fondling of the breasts, buttocks, anus or genitals; or the simulation

thereof within an establishment dealing in alcoholic beverages.

(f) No person shall cause and no person maintaining, owning or operating an establishment dealing in alcoholic beverages shall suffer or permit the exposition of any graphic representation, including pictures or the projection of film, which depicts human genitals; pubic area; vulva; anus; anal cleft or cleavage; buttocks; female breasts below the top of the areola; sexual intercourse; masturbation; sodomy; bestiality; oral copulation; flagellation; sexual act prohibited by law; touching, caressing or fondling of the breasts, buttocks, anus, or genitals; or any simulation thereof within any establishment dealing in alcoholic beverages.

Daytona Beach, Fla., Ordinance 81-334 § 1 (Oct. 21, 1981), *codified at* Daytona Beach, Fla., Code § 10-6 (2001). Section 2 of Ordinance 81-334, although not codified in the City's Code of Ordinances, provides the City's rationale for Ordinance 81-334's enactment:

It is hereby found that the acts prohibited in Section 1 above encourage the conduct of prostitution, attempted rape, rape, murder, and assaults on police officers in and around establishments dealing in alcoholic beverages, that actual and simulated nudity and sexual conduct and the depiction thereof coupled with alcohol in public places begets undesirable behavior, that sexual, lewd, lascivious, and salacious conduct among patrons and employees within establishments dealing in alcoholic beverages results in violation of law and dangers to the health, safety and welfare of the public, and it is

the intent of this ordinance to prohibit nudity, gross sexuality, and the simulation and depiction thereof in establishments dealing in alcoholic beverages.
*Id.* § 2.

By 2001, the City of Daytona Beach became concerned that some bars were exploiting a loophole in Ordinance 81-334 by separating alcohol and nudity within a single structure but allowing for ready access between the two areas. The City also became increasingly concerned that lewd and lascivious conduct within adult theaters was increasing and that nudity in streets, parks, and other public places was especially a problem during events such as Spring Break and Black College Reunion.

Motivated by these perceived concerns, the City enacted Ordinance 02-496 to reduce "lewd and lascivious behavior, prostitution, sexual assaults and batteries, ... other criminal activity, ... [the] degradation of women, and ... activities which break down family structures and values."[FN10] In fact, Ordinance 02-496 was enacted as a general public nudity ordinance and prohibited any person over ten years of age from "recklessly, knowingly, or intentionally" appearing in any public place with "anything other than a full and opaque covering" over the following areas: "[t]he male or female genitals, pubic area, or anal cleavage"; "[t]he nipple and areola of the female breast"; "at least one-half of that outside surface area of the breast located below the top of the areola, which area shall be

reasonably compact and contiguous to the areola"; "[o]ne-third of the male or female buttocks centered over the cleavage of the buttocks for the length of the cleavage"; and, even if covered, the "male genitals in a discernibly turgid state."[FN11] Ordinance 02-496 also provided a non-exhaustive list of items of clothing that are *not* sufficient to comply with its provisions: "items commonly known as G-strings, T-backs, dental floss, and thongs."[FN12]

FN10. Daytona Beach, Fla., Ordinance 02-496 § 5 (Oct. 2, 2002).

FN11. Daytona Beach, Fla., Code § 62-183(a), (b), *enacted by* Ordinance 02-496 § 14.

FN12. Daytona Beach, Fla., Code § 62-183(c), *enacted by* Ordinance 02-496 § 14. Ordinance 02-496 added Article VI, "Public Nudity," to Chapter 62 of the City's Code of Ordinances. Article VI first states the City's purpose for adding a public nudity prohibition to the City's Code of Ordinances:

(a) It is the intent of this article to protect and preserve the health, safety and welfare of the people of The City of Daytona Beach by prohibiting any person from recklessly, knowingly, or intentionally appearing nude in a public place, or recklessly, knowingly, or intentionally causing or permitting another person to appear nude in a public place within the City, subject to the exceptions provided in § 62-[184].

(b) The City Commission has further expressed its intent and findings in Ordinance 02-496, adopting this article.

Daytona Beach Code § 62-181. After defining the terms "breast," "buttocks," "public place provided or set apart for nudity," and "public place," *see id.* § 62-182, Article VI then lists the following substantive prohibitions:

(a) It shall be unlawful for any person ten years of age or older to recklessly, knowingly, or intentionally appear in a public place, or to recklessly, knowingly, or intentionally cause or permit another person ten years of age or older to appear in a public place in a state of dress or undress such that any of the following body parts or portions thereof are exposed to view or are covered with anything other than a full and opaque covering which completely covers all of the described area:

(1) The male or female genitals, pubic area, or anal cleavage.

(2) The nipple and areola of the female breast; and in addition at least one-half of that outside surface area of the breast located below the top of the areola, which area shall be reasonably compact and contiguous to the areola.

(3) One third of the male or female buttocks centered over the cleavage of the buttocks for the length of the cleavage. This area is more particularly described as that portion of the buttocks which lies between the top and bottom of the buttocks, and between two imaginary straight lines, one on each side of the anus and each line being located one-third of the distance from the anus to the outside perpendicular line defining the buttocks, and each line being perpendicular to the

ground and to the horizontal lines defining the buttocks.

(b) It shall be unlawful for any person to recklessly, knowingly, or intentionally appear in a public place, or to recklessly, knowingly, or intentionally cause or permit another person to appear in a public place in a manner as to show or display the covered male genitals in a discernibly turgid state.

(c) Attire which is insufficient to comply with these requirements includes but is not limited to those items commonly known as G-strings, T-backs, dental floss, and thongs.

(d) Body paint, body dye, tattoos, latex, tape, or any similar substance applied to the skin surface, any substance that can be washed off the skin, or any substance designed to simulate or which by its nature simulates the appearance of the anatomical area beneath it, is not full and opaque covering as required by this section.

*Id.* § 62-183. Article VI then provides that "[t]he offense of public nudity or exposure as set forth in section 62-183 shall not occur in any of the following instances:"

(1) When a person appears nude in a public place provided or set apart for nudity, and such person is nude for the sole purpose of performing a legal function that is customarily intended to be performed within such public place, and such person is not nude for the purpose of obtaining money or other financial gain for such person or for another person or entity; or

(2) When the conduct of being nude cannot constitutionally be prohibited by this section because it constitutes a part of a bona fide live

communication, demonstration, or performance by such person wherein such nudity is expressive conduct incidental to and necessary for the conveyance or communication of a genuine message or public expression, and is not a guise or pretense utilized to exploit nudity for profit or commercial gain; or

(3) When the conduct of being nude cannot constitutionally be prohibited by this section because it is otherwise protected by the United States Constitution or the Florida Constitution.

*Id.* § 62-184(a) (citations omitted).

In July 2003, less than a year after the City enacted Ordinance 02-496, a panel of this Court decided *Peek-A-Boo Lounge of Bradenton, Inc. v. Manatee County*, 337 F.3d 1251 (11th Cir.2003). That decision suggested that an ordinance that does not leave an erotic dancer "free to perform wearing pasties and G-strings" would violate the First Amendment because it would significantly affect the dancer's "capacity to convey [an] erotic message." *Id.* at 1274 (quotation marks omitted). About five weeks later, the City enacted Ordinance 03-375, which amended Ordinance 02-496 to allow erotic dancers to wear G-strings and pasties "within a fully enclosed structure legally established as an adult theater" that is more than 500 feet from an establishment that serves alcohol.[FN13] Within 500 feet of an alcohol-serving establishment, however, Ordinance 02-496 applies and, as described above, requires clothing somewhat more modest than G-strings and pasties.[FN14]

FN13. Daytona Beach, Fla., Ordinance 03-375 § 9 (Aug. 20, 2003), *codified at* Daytona Beach, Fla., Code § 62-184(b). Ordinance 03-375 added the following exception to the City's Code of Ordinances:

(1) In the course of the presentation of erotic dance or other artistic expression which is entitled to first amendment protection within a fully enclosed structure legally established as an adult theater as defined in the Land Development Code:

a. The breast covering required by subsection 62-183(a)(2) shall not be required, except that nipples and areolae shall be covered.

b. The buttocks covering required by subsection 62-183(a)(3) shall not be required, and subsection 62-183(c) shall not apply.

Daytona Beach Code § 62-184(b)(1), *enacted by* Ordinance 03-375 § 9.

FN14. Specifically, the more modest clothing requirements apply to an adult theater that:

a. is located in the same structure as an establishment dealing in alcoholic beverages ... unless the closest point of the premises of the alcoholic beverage establishment is more than 500 feet from the boundary line of the adult theater use; or

b. is located under the same roof as an establishment dealing in alcoholic beverages ... unless the closest point of the premises of the alcoholic beverage establishment is more than 500 feet from the boundary line of the adult theater use; or

c. shares any wall, floor, or ceiling with an establishment dealing in alcoholic beverages ...; or
d. shares an entry area with an establishment dealing in alcoholic beverages ...; or
e. provides for or permits the interior passage of customers directly or indirectly between it and an establishment dealing in alcoholic beverages ..., whether or not a separate cover or admission fee is charged; or
f. is located adjacent or next door to an establishment dealing in alcoholic beverages ...; or
g. is located within 500 feet of an establishment dealing in alcoholic beverages ..., measured from property line of one use to property line of the other use, including parking areas and other appurtenances associated with each use; or
h. is not legally authorized to operate as an adult theater.

Daytona Beach Code § 62-184(b)(2), *enacted by* Ordinance 03-375 § 9.

*C. Lollipop's Lawsuit*

On December 10, 2003, Lollipop's brought this suit challenging the constitutionality of the zoning ordinances and of Ordinances 81-334, 02-496, and 03-375. First, Lollipop's claimed that the zoning ordinances do not offer reasonable alternative venues for adult theaters to communicate their erotic message because an insufficient number of sites are available for adult theaters. Alternatively, Lollipop's claimed that it was "grandfathered in" as a lawful nonconforming use under Florida law. The district judge, who also presided over the *Red-Eyed*

*Jack* litigation, granted summary judgment to the City of Daytona Beach on both claims, noting that the City had made no changes to the zoning ordinances since his decision in *Red-Eyed Jack II* and that Lollipop's provided no evidence that warranted a departure from the earlier decision.

Second, Lollipop's challenged Ordinances 81-334, 02-496, and 03-375, urging that they neither further a substantial government interest nor are narrowly tailored. The district court granted final summary judgment to the City on Lollipop's narrow tailoring claim, but concluded that there was a genuine issue of material fact about whether the three nudity ordinances furthered a substantial government interest. Thereafter, at a six-day bench trial, Lollipop's presented expert testimony in an effort to cast direct doubt on the City's rationale for enacting the nudity ordinances. The experts explained at trial that they had conducted two empirical studies using data provided by the City. They concluded based on the data they examined that adult theaters in Daytona Beach had no statistically significant effect on crime rates, and that the City's evidence offered to the contrary was "shoddy" and "meaningless."

The district court agreed and concluded that Lollipop's evidence cast direct doubt on the City's rationale for enacting the nudity ordinances:
Plaintiffs have succeeded in their attempt to cast direct doubt on the City's rationales for its ordinances. As persuasively demonstrated by Plaintiffs' expert studies, the City's pre-enactment

evidence consists either of purely anecdotal evidence or opinions based on highly unreliable data. Most notably, the City's evidence lacks data which would allow for a comparison of the rate of crime occurring in and around adult entertainment establishments with the rate of crime occurring in and around similarly situated establishments. Absent the context that such a comparison might provide, the City's data is, as Plaintiffs assert, "meaningless."

The court also determined that the additional evidence provided by the City in an effort to renew support for the ordinances was similarly flawed. The district court, therefore, held that Ordinances 81-334, 02-496, and 03-375 did not further a substantial government interest and declared that they violated the First Amendment. In fact, the district court struck all three nudity ordinances in their entirety, except for subsection 10-6(e) of the Daytona Beach Code (enacted by Ordinance 81-334) because that subsection regulates non-expressive conduct.

These appeals followed: Lollipop's argued that the district court had improvidently entered summary judgment for the City on its challenge to the zoning ordinances, as well as on its claim to grandfather status. The City, in turn, cross-appealed the court's determination that the three nudity ordinances were unconstitutional. Lollipop's also appealed from the grant of final summary judgment to the City on its claim that the nudity ordinances are not narrowly tailored.[FN15]

FN15. Lollipop's also claimed in the district court that it is exempt from Ordinance 02-496 by its own terms, but the district court had no occasion to rule on this claim because it declared Ordinance 02-496 unconstitutional. Because Lollipop's does not raise this argument on appeal, the claim is deemed abandoned. *See Access Now, Inc. v. Southwest Airlines Co.*, 385 F.3d 1324, 1330 (11th Cir.2004).

II. *Zoning Ordinances*

The City's zoning ordinances do not ban adult theaters altogether but do restrict them to the BA and M-5 zoning districts and, in the BA districts, impose distance requirements between adult theaters and churches, schools, parks, playgrounds, and other adult businesses.[FN16] We review the constitutionality of a city ordinance *de novo*. *See Peek-A-Boo Lounge of Bradenton, Inc. v. Manatee County*, 337 F.3d 1251, 1255 (11th Cir.2003).

FN16. In BA districts, an adult theater must be located at least 400 feet from "any residential, R-PUD, T-1, or T-2 district," 400 feet from any church, school, park, playground, or "any other public or semi-public place of assembly where large numbers of minors regularly travel or congregate," and 1000 feet from other adult businesses. Daytona Beach, Fla., Land Dev.Code art. XI, § 3.2 (2001).

[1] It is by now well-established that zoning ordinances limiting the locations where adult businesses may be located are evaluated under the

three-part test for time, place, and manner regulations established in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986), and reaffirmed in *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 122 S.Ct. 1728, 152 L.Ed.2d 670 (2002). *Peek-A-Boo Lounge*, 337 F.3d at 1264;*see also David Vincent, Inc. v. Broward County*, 200 F.3d 1325, 1333 (11th Cir.2000). We have summarized the *Renton* framework this way:

first, the court must determine whether the ordinance constitutes an invalid total ban or merely a time, place, and manner regulation; second, if the ordinance is determined to be a time, place, and manner regulation, the court must decide whether the ordinance should be subject to strict or intermediate scrutiny; and third, if the ordinance is held to be subject to intermediate scrutiny, the court must determine whether it is designed to serve a substantial government interest and allows for reasonable alternative channels of communication.

*Peek-A-Boo Lounge*, 337 F.3d at 1264;*see also Renton*, 475 U.S. at 46-50, 106 S.Ct. 925. Because neither party disputes that the first two prongs have been satisfied or that the zoning ordinances serve a substantial government interest, our analysis under *Renton* focuses solely on whether the zoning ordinances provide adult theaters with reasonable alternative channels of communication. We hold that they do.

A new zoning regime must leave adult businesses with a "reasonable opportunity to relocate," and "the number of sites available for adult businesses under the new zoning regime must be greater than or equal to the number of adult businesses in existence at the time the new zoning regime takes effect." *Fly Fish, Inc. v. City of Cocoa Beach*, 337 F.3d 1301, 1310-11 (11th Cir.2003) (quoting *David Vincent*, 200 F.3d at 1337 n. 17). Although a district court's calculation of the number of sites that a zoning ordinance makes available for adult businesses is a factual finding that we review only for clear error, the district court's methodology in making that calculation-such as whether a particular site is "available" and provides a reasonable avenue for communicating an adult business's erotic message-is a legal determination that we review *de novo*. *David Vincent*, 200 F.3d at 1333;*see also Fly Fish*, 337 F.3d at 1309.

[2] We have enumerated several "general rules" to aid in deciding whether a particular site is available for First Amendment purposes:
First, the economic feasibility of relocating to a site is not a First Amendment concern. Second, the fact that some development is required before a site can accommodate an adult business does not mean that the land is, *per se*, unavailable for First Amendment purposes. The ideal lot is often not to be found. Examples of impediments to the relocation of an adult business that may not be of a constitutional magnitude include having to build a new facility instead of moving into an existing building; having to clean up waste or landscape a

site; bearing the costs of generally applicable lighting, parking, or green space requirements; making [do] with less space than one desired; or having to purchase a larger lot than one needs. Third, the First Amendment is not concerned with restraints that are not imposed by the government itself or the physical characteristics of the sites designated for adult use by the zoning ordinance. It is of no import under *Renton* that the real estate market may be tight and sites currently unavailable for sale or lease, or that property owners may be reluctant to sell to an adult venue.

*David Vincent*, 200 F.3d at 1334-35. As the Supreme Court explained in *Renton*, simply because adult businesses "must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees, does not give rise to a First Amendment violation." 475 U.S. at 54, 106 S.Ct. 925.

[3] Here, the district court relied on its earlier finding in *Red-Eyed Jack II* that twenty-five sites-twenty-four in the M-5 district and one in the BA district-are available for adult theaters. 322 F.Supp.2d at 1372-75. Because the *Red-Eyed Jack II* court found that, at most, ten adult theaters were operating or seeking to operate in the City of Daytona Beach, *id.* at 1367, it held that the zoning ordinances provide for a constitutionally sufficient number of sites, *id.* at 1375. In the instant case, the district court concluded that Lollipop's had presented no evidence to warrant a departure from its earlier ruling in *Red-Eyed Jack II*.

[4] Lollipop's also claims that, even if the zoning ordinances are constitutional, Lollipop's is otherwise "grandfathered in" under Florida law.[FN17] Lollipop's argument is grounded on the contention that the zoning ordinances were unconstitutional at the time that Lollipop's began operating as an adult theater. Although the City may now have cured the earlier constitutional defects, Lollipop's argues that no valid law made Lollipop's unlawful when it opened. Thus, according to Lollipop's, its right to operate at its current location "vested" at that time, and it may continue to operate there despite any subsequent changes to the zoning ordinances that rendered it a nonconforming use.[FN18] The district court granted summary judgment to the City on this claim too, and we review the district court's determination *de novo*. *See* Reserve, Ltd. v. Town of Longboat Key, 17 F.3d 1374, 1377 (11th Cir.1994).

FN17. The Constitution does not require a "grandfathering" provision for existing nonconforming adult businesses, David Vincent, 200 F.3d at 1332, and any vested right to continue operating as a lawful nonconforming use derives from state law, *see* Coral Springs St. Sys., Inc. v. City of Sunrise, 371 F.3d 1320, 1333 (11th Cir.2004).

FN18. Lollipop's is located at 639 Grandview Avenue in Daytona Beach, Florida, and has been operating as an adult theater there since October 2000. Although the City disputes when Lollipop's began operating as an adult theater, Lollipop's

claim to grandfather status was decided in the district court on the City's motion for summary judgment, and therefore we construe the record in the light most favorable to Lollipop's.

[5] "Not surprisingly, vested rights are not created easily" under Florida law. *Coral Springs St. Sys., Inc. v. City of Sunrise*, 371 F.3d 1320, 1333 (11th Cir.2004) . "The overarching pattern in Florida's case law is that vested rights can be created ... only in two circumstances." *Id.* at 1334. The first occurs "when a party has reasonably and detrimentally relied on existing law, creating the conditions of equitable estoppel," while the second occurs "when the defendant municipality has acted in a clear display of bad faith." *Id.* Here, neither circumstance applies. It is undisputed that when Lollipop's began operating as an adult theater, it violated the zoning ordinances as then written. As a matter of logic, then, Lollipop's cannot have relied on existing law because it began operating plainly in contravention of that law. Nor is there any record evidence of bad faith or arbitrary behavior by the City. Therefore, on this record, the district court correctly concluded that Lollipop's has failed to establish a vested right to continue operating as a lawful nonconforming use.

III. *Nudity Ordinances*

[6] We analyze the three nudity ordinances challenged here under the four-part test for expressive conduct set forth by the Supreme Court in *United States v. O'Brien*, 391 U.S. 367, 88 S.Ct.

1673, 20 L.Ed.2d 672 (1968), and employed in *City of Erie v. Pap's A.M.*, 529 U.S. 277, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000). As we have explained: According to this test, public nudity ordinances that incidentally impact protected expression should be upheld if they (1) are within the constitutional power of the government to enact; (2) further a substantial governmental interest; (3) are unrelated to the suppression of free expression; and (4) restrict First Amendment freedoms no greater than necessary to further the government's interest.

*Peek-A-Boo Lounge*, 337 F.3d at 1264. Here, our analysis focuses on the second and fourth prongs because there is no dispute between the parties as to the first and third prongs.

*A. Substantial Government Interest*

[7] Under *O'Brien* 's second prong, a city must establish that the challenged ordinance furthers a substantial government interest. *Pap's A.M.*, 529 U.S. at 296, 120 S.Ct. 1382 (plurality opinion).[FN19] It has been by now clearly established that reducing the secondary effects associated with adult businesses is a substantial government interest "that must be accorded high respect." *City of L.A. v. Alameda Books, Inc.*, 535 U.S. 425, 444, 122 S.Ct. 1728, 152 L.Ed.2d 670 (2002) (Kennedy, J., concurring in the judgment) (quotation marks omitted);[FN20] *see also Pap's A.M.*, 529 U.S. at 296, 120 S.Ct. 1382 (plurality opinion) ("[C]ombating the harmful secondary effects associated with nude

dancing [is] undeniably important."); *Ctr. for Fair Pub. Policy v. Maricopa County*, 336 F.3d 1153, 1166 (9th Cir.2003) ("It is beyond peradventure at this point in the development of the doctrine that a state's interest in curbing the secondary effects associated with adult entertainment establishments is substantial.").

FN19. In *Pap's A.M.*, like some of the Supreme Court's other decisions in this area, there was no majority opinion on the First Amendment issue before the Court. Justice O'Connor wrote a plurality opinion, joined by Chief Justice Rehnquist and Justices Kennedy and Breyer, which upheld under *O'Brien* the constitutionality of the nudity ordinance at issue. *Pap's A.M.*, 529 U.S. at 289-302, 120 S.Ct. 1382 (plurality opinion). Relevant here, the plurality concluded that *O'Brien* 's second prong was satisfied because "[t]he asserted interests of regulating conduct through a public nudity ban and of combating the harmful secondary effects' associated with nude dancing are undeniably important," and because the evidence that the city produced established that "it was reasonable for [the city] to conclude that ... nude dancing was likely to produce the[se] secondary effects." *Id.* at 296-97, 120 S.Ct. 1382. Justice Scalia wrote a separate opinion, joined by Justice Thomas, concurring in the judgment. They agreed that the ordinance should be upheld, "not because it survives some lower level of First Amendment scrutiny [i.e., *O'Brien*], but because, as a general law regulating conduct and not specifically directed at expression, it is not subject to First Amendment

scrutiny at all." *Id.* at 307-08, 120 S.Ct. 1382 (Scalia, J., concurring in the judgment) (quotation marks omitted). Justice Souter concurred in part and dissented in part. He agreed with the plurality that the nudity ordinance at issue should be analyzed under *O'Brien*.*Id.* at 310, 120 S.Ct. 1382 (Souter, J., concurring in part and dissenting in part). But he dissented from the judgment because, unlike the plurality, he concluded that the city failed to carry its evidentiary burden to show that its ordinance furthered a substantial government interest. *Id.* at 313-17, 120 S.Ct. 1382. Justice Stevens also wrote a dissenting opinion, joined by Justice Ginsburg.

For our purposes, a majority of the Court-the four-Justice plurality along with Justice Souter-held that nudity ordinances that are designed to combat the secondary effects associated with nude dancing are analyzed under the *O'Brien* framework. *See id.* at 289-91, 120 S.Ct. 1382 (plurality opinion); *id.* at 310, 120 S.Ct. 1382 (Souter, J., concurring in part and dissenting in part). As for the Court's judgment that the ordinance at issue was constitutional-supported by the plurality and by Justices Scalia and Thomas's concurrence in the judgment-no rationale explaining that result gained the support of a majority of the Court. "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *Marks v. United States*, 430 U.S. 188, 193, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977) (quotation

marks omitted). In *Pap's A.M.*, the plurality upheld the ordinance on the rationale that it survived First Amendment scrutiny under the *O'Brien* framework, and although the votes of Justices Scalia and Thomas were necessary for the judgment, their grounds for concurring in the judgment were far broader than the plurality's, namely, that the First Amendment did not apply "at all." *See Pap's A.M.*, 529 U.S. at 307-08, 120 S.Ct. 1382 (Scalia, J., concurring in the judgment). As such, the plurality's holding with respect to the *application* of *O'Brien* is the narrowest ground supporting the judgment in *Pap's A.M.* and, therefore, represents the holding of that case under *Marks*.*Peek-A-Boo Lounge*, 337 F.3d at 1261-62;*accord Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1198 (10th Cir.2003); *SOB, Inc. v. County of Benton*, 317 F.3d 856, 862 n. 1 (8th Cir.2003); *Ben's Bar, Inc. v. Village of Somerset*, 316 F.3d 702, 719 (7th Cir.2003).

FN20.*Alameda Books* addressed the constitutionality of a zoning ordinance under the *Renton* framework, rather than a public nudity ordinance under the *O'Brien* framework. We have explained, however, that the third step of the *Renton* analysis, which asks whether an ordinance "is designed to serve" a substantial government interest, is "virtually indistinguishable" from the second prong of the *O'Brien* test, which asks whether an ordinance "furthers" a substantial government interest. *Peek-A-Boo Lounge*, 337 F.3d at 1264-65. Therefore, although we are addressing the constitutionality of the City's nudity ordinances

under *O'Brien*, our analysis also relies on cases that addressed the constitutionality of zoning ordinances under *Renton*.

There was no majority opinion in *Alameda Books*. Justice O'Connor wrote a plurality opinion, joined by Chief Justice Rehnquist and Justices Scalia and Thomas, that applied *Renton* and concluded that the zoning ordinance at issue was constitutional. *Alameda Books*, 535 U.S. at 429-43, 122 S.Ct. 1728 (plurality opinion). Justice Kennedy wrote a separate opinion concurring in the judgment. He agreed with the plurality that the zoning ordinance at issue should be analyzed under *Renton*, but he concurred in the judgment because he believed that "the plurality's application of *Renton* might constitute a subtle expansion, with which [he did] not concur." *Id.* at 445, 122 S.Ct. 1728 (Kennedy, J., concurring in the judgment). Justice Souter dissented, and his opinion was joined by Justices Stevens, Ginsburg, and, in part, Breyer. *Id.* at 453-66, 122 S.Ct. 1728 (Souter, J., dissenting). Because Justice Kennedy concurred in the judgment in *Alameda Books* on the narrowest grounds, his opinion represents the Supreme Court's holding in that case under *Marks.Peek-A-Boo Lounge*, 337 F.3d at 1264; *accord SOB, Inc.*, 317 F.3d at 862 n. 1;*Ben's Bar, Inc.*, 316 F.3d at 722.

[8] As for whether an ordinance "furthers" this interest, a city bears the initial burden of producing evidence that it relied upon to reach the conclusion that the ordinance furthers the city's interest in reducing secondary effects. *Peek-A-Boo Lounge*, 337 F.3d at 1269. To that end, a city need not "conduct

new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses." *Alameda Books*, 535 U.S. at 451, 122 S.Ct. 1728 (Kennedy, J., concurring in the judgment) (quoting *Renton*, 475 U.S. at 51-52, 106 S.Ct. 925);*see also id.* at 438, 122 S.Ct. 1728 (plurality opinion) ("[A] municipality may rely on any evidence that is reasonably believed to be relevant for demonstrating a connection between speech and a substantial, independent government interest."(quotation marks omitted)); *Pap's A.M.*, 529 U.S. at 296, 120 S.Ct. 1382 (plurality opinion) (quoting *Renton* 's "reasonably believed to be relevant" language). Although a municipality "must rely on at least *some* pre-enactment evidence," such evidence can consist of "a municipality's own findings, evidence gathered by other localities, or evidence described in a judicial opinion." *Peek-A-Boo Lounge*, 337 F.3d at 1268;*see, e.g.*, *Pap's A.M.*, 529 U.S. at 300, 120 S.Ct. 1382 (plurality opinion) (finding sufficient that "the city council relied on this Court's opinions detailing the harmful secondary effects caused by [adult] establishments ..., as well as on its own experiences"); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 584, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991) (Souter, J., concurring in the judgment)[FN21] (permitting a municipality to rely on prior judicial opinions); *Renton*, 475 U.S. at 51-52, 106 S.Ct. 925 (holding that the city was entitled to rely on the experiences of other cities and on a judicial opinion).

FN21. Just as in *Alameda Books* and *Pap's A.M.*, a majority of the Court in *Barnes* did not support a single rationale explaining the result. The plurality opinion written by Chief Justice Rehnquist, joined by Justices O'Connor and Kennedy, upheld the regulation under the *O'Brien* framework. *Barnes*, 501 U.S. at 569-72, 111 S.Ct. 2456 (plurality opinion). Relevant here, the plurality found *O'Brien*'s second prong satisfied by evidence that the regulation at issue "furthers a substantial government interest in protecting order and morality," which the plurality considered to be an interest "unrelated to the suppression of free expression." *Id.* at 569-70, 111 S.Ct. 2456. Justice Scalia concurred in the judgment because, in his view, a general public nudity prohibition "is not subject to First Amendment scrutiny at all." *Id.* at 572, 111 S.Ct. 2456 (Scalia, J., concurring in the judgment). Justice Souter also concurred in the judgment. Unlike Justice Scalia, he agreed with the plurality that the regulation should be analyzed under *O'Brien*. But Justice Souter "[wrote] separately to rest [his] concurrence in the judgment, not on the possible sufficiency of society's moral views to justify the limitations at issue, but on the State's substantial interest in combating the secondary effects of adult entertainment establishments." *Id.* at 582, 111 S.Ct. 2456 (Souter, J., concurring in the judgment). As we have explained, "[b]ecause Justice Souter provided the narrowest grounds for the judgment of the Court in *Barnes*, his concurrence constitutes the holding of that case" under *Marks.Peek-A-Boo Lounge*, 337

F.3d at 1260;*accord* *Heideman*, 348 F.3d at 1197-98.

Once a city has provided evidence that it reasonably believed to be relevant to its rationale for enacting the ordinance, plaintiffs must be given the opportunity to "cast direct doubt on this rationale," either by demonstrating that the city's evidence does not support its rationale or by furnishing evidence that disputes the city's factual findings. *Peek-A-Boo Lounge*, 337 F.3d at 1265 (quoting *Alameda Books*, 535 U.S. at 438-39, 122 S.Ct. 1728 (plurality opinion)); *see, e.g.*, *Pap's A.M.*, 529 U.S. at 298, 120 S.Ct. 1382 (plurality opinion) (rejecting claim when plaintiff "never challenged the city council's findings or cast any specific doubt on the validity of those findings"). "If plaintiffs succeed in casting doubt on a municipality's rationale in either manner, the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance." *Alameda Books*, 535 U.S. at 439, 122 S.Ct. 1728 (plurality opinion) (citing *Pap's A.M.*, 529 U.S. at 298, 120 S.Ct. 1382 (plurality opinion)); *see also* *Peek-A-Boo Lounge*, 337 F.3d at 1269.

Although the burden lies with the municipality, a court "should be careful not to substitute its own judgment for that of the [municipality,]" and the municipality's "legislative judgment should be upheld provided that [it] can show that its judgment is still supported by credible evidence,

upon which [it] reasonably relies." *Peek-A-Boo Lounge*, 337 F.3d at 1273.

[9] Here, the City of Daytona Beach plainly carried its initial burden to show that the three challenged nudity ordinances furthered its interest in reducing the negative secondary effects associated with adult theaters. The City has produced a substantial body of evidence that it reasonably believed to be relevant to combating those problems. Ordinance 81-334 prohibits nudity and sexual conduct in establishments that serve alcohol. As the Ordinance itself says, the City's rationale was to reduce the negative secondary effects associated with adult theaters:

It is hereby found that the acts prohibited in [this ordinance] encourage the conduct of prostitution, attempted rape, rape, murder, and assaults on police officers in and around establishments dealing in alcoholic beverages, that actual and simulated nudity and sexual conduct and the depiction thereof coupled with alcohol in public places begets undesirable behavior, that sexual, lewd, lascivious, and salacious conduct among patrons and employees within establishments dealing in alcoholic beverages results in violation of law and dangers to the health, safety and welfare of the public....

Ordinance 81-334 § 2. To support this rationale, Ordinance 81-334 cites two Supreme Court decisions, *New York State Liquor Authority v. Bellanca*, 452 U.S. 714, 101 S.Ct. 2599, 69 L.Ed.2d 357 (1981) (per curiam), and *California v. LaRue*,

409 U.S. 109, 93 S.Ct. 390, 34 L.Ed.2d 342 (1972), both of which upheld prohibitions on nude dancing in establishments that serve alcohol. *See Bellanca*, 452 U.S. at 718, 101 S.Ct. 2599 (upholding statute where the legislature had found that "[c]ommon sense indicates that any form of nudity coupled with alcohol in a public place begets undesirable behavior"); *LaRue*, 409 U.S. at 118-19, 93 S.Ct. 390 ("The ... conclusion ... that certain sexual performances and the dispensation of liquor by the drink ought not to occur at premises that have licenses was not an irrational one.").

Although the City's reliance on these cases may be sufficient to carry the City's initial burden, *see Pap's A.M.*, 529 U.S. at 296-97, 120 S.Ct. 1382 (plurality opinion) (suggesting that a city can carry its initial burden by relying solely on relevant Supreme Court cases), the legislative history of Ordinance 81-334 shows that the City also relied on its own experiences to support its rationale. That legislative history includes: a document describing the difficulties faced by law enforcement in arresting and successfully prosecuting crimes relating to prostitution and pornography and listing arrests for prostitution and other crimes that occurred in or near many Daytona Beach adult businesses; a short memorandum written by the City's police chief that provides "a partial list of situations, offenses and incidents which have occurred within the areas of topless bar establishments .... [that] can be substantiated by police reports and testimony of various police officers"; police dispatch records of calls for service

("CAD data"[FN22]) from areas around adult businesses from November 1980 to July 1981, which were attached to the police chief's memorandum; police reports of eighty-three prostitution arrests; police reports of seven arrests for assault and battery of a police officer in or near an adult theater; and the minutes of a public hearing summarizing local business owners' firsthand accounts of criminal activity in and around adult businesses.

FN22. "CAD" stands for Computer Automated Dispatch.

This legislative history supporting the enactment of Ordinance 81-334 is more than sufficient to carry the City's initial burden under *O'Brien* 's second prong. *See, e.g.*, *Alameda Books*, 535 U.S. at 452, 122 S.Ct. 1728 (Kennedy, J., concurring in the judgment) (concluding that the city carried its initial burden with "a single study and common experience"); *Pap's A.M.*, 529 U.S. at 297-98, 120 S.Ct. 1382 (plurality opinion) (holding that the city's legislative findings were sufficient because "city council members, familiar with [the city's] commercial downtown ..., are the individuals who would likely have had firsthand knowledge of what took place at and around nude dancing establishments"); *see also* *Peek-A-Boo Lounge*, 337 F.3d at 1269-70.

As for Ordinances 02-496 and 03-375, the City likewise carried its initial burden of proof. Ordinance 02-496 was enacted as a general public

nudity ordinance "to protect and preserve the health, safety and welfare" of the City's residents. Daytona Beach, Fla., Code § 62-181(a), *enacted by* Ordinance 02-496 § 14. The Ordinance sets forth the following findings: "The appearance of persons in the nude in public places ... increases incidents of lewd and lascivious behavior, prostitution, sexual assaults and batteries, attracts other criminal activity to the community, encourages degradation of women, and facilitates other activities which break down family structures and values." Ordinance 02-496 § 5. To support these findings, the City relied on, among other things, newspaper articles describing incidents of public nudity and other criminal activity during Spring Break and Black College Reunion, FN23 narrative reports by undercover detectives describing instances of sexual conduct, nudity, and violations of Ordinance 81-334 by dancers at adult theaters,FN24 and the Supreme Court's decisions in *Pap's A.M.*, 529 U.S. 277, 120 S.Ct. 1382, and *Barnes*, 501 U.S. 560, 111 S.Ct. 2456, 115 L.Ed.2d 504. As with Ordinance 81-334, the pre-enactment evidence for Ordinance 02-496 is sufficient for the City to carry its initial burden under *O'Brien*'s second prong.

FN23. *See* Henry Frederick, *Police Chief: Spring Break, BCR Hurt Family Tourism,* Daytona Beach News-Journal, Apr. 16, 2002 (" 'Youth-oriented street festivals like BCR and Spring Break keep family tourism away.' "); Anne Geggis, *Barter on the Beach: Beads for Breasts,* Daytona Beach News-Journal, Mar. 24, 2002 ("Daytona Beach police confirm they've been seeing more than usual this

year-and issuing more $104 tickets for exposure of female breasts than at previous Spring Breaks.... 'Even the chief this (past) weekend witnessed it and moved to make an arrest of a mother and daughter on Atlantic Avenue,' says [a] spokesman for the Daytona Beach police." ..."Some are concerned the atmosphere is ripe for an incident like the New York City 'wilding' of 2000 during which women's clothes were torn off their bodies."); Audrey Parente, *BCR "Shocking" for Pennsylvania Sisters,* Daytona Beach News-Journal, Apr. 15, 2002, at 6A (" 'I saw guys exposing themselves,' Miller said. Schubert said she saw '... women in small clothes-thongs and very exposing bras....' Worse than the exposure, she said she saw drug use and drug sales. 'I saw a young man in a car in front of me smoking a joint and passing it from car to car. They were walking around on the road.' ").

FN24. For example, on March 8, 2002, several undercover investigators went to Lollipop's "to conduct a covert inspection of the activities" there: During this inspection, alcoholic beverages were being sold and consumed.... This writer observed bare breasted dancers performing "lap" dances involving simulated intercourse by the female dancer [who placed] her buttocks in the lap of the patron and began to manipulate her hips back and forth and up and down. While engaged in the previous activities, dancers would rub their bare breasts in the faces of the patrons and allow the patrons to lick and suck the breasts.... This writer observed every dancer to be in violation of the

exposed breasts ordinance while alcohol was being served and consumed.
Daytona Beach Police Department, *Florida Offense/Incident Report No. 0203103,* at 1-2 (Mar. 11, 2002).

Ordinance 03-375 amended Ordinance 02-496 to allow erotic dancers to wear G-strings and pasties within an adult theater located more than 500 feet from an establishment that serves alcohol, but Ordinance 02-496's somewhat more restrictive clothing requirements[FN25] remain applicable within 500 feet of such an establishment. Daytona Beach, Fla., Code § 62-184(b), *enacted by* Ordinance 03-375 § 9. In support of Ordinance 03-375, the City relied on Mr. Langston's and Mr. Smith's testimony from *Function Junction, Inc.*, 705 F.Supp. 544.[FN26] As we have noted, Langston testified that live nude and seminude entertainment businesses "promote and perpetuate urban decay" and that "adult businesses have impacted on crime in the area surrounding Daytona Beach." *Id.* at 547. Smith, who as an assistant state attorney had prosecuted drug and prostitution offenses in Daytona Beach, concurred that "there were more drug and prostitution offenses in topless bars than in other bars." *Id.* at 548.

FN25. *See supra* note 12.

FN26. Although *Function Junction* was a challenge to the City's zoning ordinances, 705 F.Supp. at 545, the City relied on testimony from that case in support of Ordinance 03-375.

The City also relied on several controlled studies conducted by Dr. William George about the relationship between drinking alcohol and sexual conduct. Thus, for example, one study found that exposure to erotica led male subjects to drink more alcohol than did exposure to non-erotic materials.FN27 Another study found that young men who believed they had consumed alcohol-regardless of whether they had in fact done so-displayed greater interest in viewing violent and/or erotic images and reported increased sexual arousal than young men who believed they had not consumed alcohol.FN28 Still another study found that study participants perceived a woman they believed had consumed alcohol as being "significantly more aggressive, impaired, sexually available, and as significantly more likely to engage in foreplay and intercourse" than a woman whom study participants believed had not consumed alcohol.FN29 Finally, Ordinance 03-375 expressly incorporates all of the evidence that the City previously had relied on to support Ordinances 81-334 and 02-496. The City's pre-enactment evidence for Ordinance 03-375 is sufficient to carry the City's initial burden under *O'Brien*'s second prong.

FN27. William H. George et al., *The Effects of Erotica Exposure on Drinking*, 1 Annals Sex Res. 79 (1988).

FN28. William H. George & G. Alan Marlatt, *The Effects of Alcohol and Anger on Interest in Violence,*

*Erotica, and Deviance,* 95 J. Abnormal Psych. 150 (1986).

FN29. William H. George et al., *Perceptions of Postdrinking Female Sexuality: Effects of Gender, Beverage Choice, and Drink Payment,* 1988 J. Applied Soc. Psych. 1295, 1295.

Because the City carried its initial burden, the district court properly gave Lollipop's the opportunity to "cast direct doubt" on the City's rationale, either by demonstrating that the City's evidence does not support its rationale or by furnishing evidence that disputes the City's factual findings. *See Pap's A.M.*, 529 U.S. at 298, 120 S.Ct. 1382 (plurality opinion); *Peek-A-Boo Lounge*, 337 F.3d at 1265;*see also Alameda Books*, 535 U.S. at 438-39, 122 S.Ct. 1728 (plurality opinion). To this end, as we have noted, two expert witnesses testified that the City's pre-enactment evidence consisted of "shoddy," "meaningless," and "unreliable" data and that its reasoning was equally "shoddy." The experts explained that the City provided no empirical data to support the conclusion that prostitution and other crimes occurred more frequently in and around adult theaters than elsewhere, and that the CAD data and police reports lacked reliability because they did not cover all of the areas where adult theaters are located in Daytona Beach and contained no comparison data from other areas of the City against which the incidents occurring in and around adult theaters could be measured. Similarly, Lollipop's experts said that the narrative

decision in *Alameda Books* and our opinion in *Peek-A-Boo Lounge* to have "raised the bar somewhat" on *Renton* 's "reasonably believed to be relevant" standard. (Dist. Ct. Am. Order 9-10.)

In *Alameda Books*, the plurality explained the *Renton* standard this way:

> In *Renton*, we specifically refused to set such a high bar for municipalities that want to address merely the secondary effects of protected speech. We held that a municipality may rely on any evidence that is "reasonably believed to be relevant" for demonstrating a connection between speech and a substantial, independent government interest.

*Alameda Books*, 535 U.S. at 438, 122 S.Ct. 1728 (plurality opinion) (quoting *Renton*, 475 U.S. at 51-52, 106 S.Ct. 925). But the plurality then warned: "This is not to say that a municipality can get away with shoddy data or reasoning. The municipality's evidence must fairly support the municipality's rationale for its ordinance." *Id.* Although Justice Kennedy's opinion, not the plurality, is the holding in *Alameda Books*, we quoted the plurality's "shoddy data" and "fairly supports" language several times in *Peek-A-Boo Lounge*, 337 F.3d at 1262-63, 1265, 1266, 1269.

We do not agree, however, with Lollipop's claim that either *Alameda Books* or *Peek-A-Boo Lounge* raises the evidentiary bar or requires a city to justify its ordinances with empirical evidence or scientific studies. Justice Kennedy's *Alameda Books* concurrence, which all parties agree states

the holding of that case under the rationale explained in *Marks v. United States*, 430 U.S. 188, 193, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977), emphasized that the evidentiary standard announced in *Renton* remained sound:

[W]e have consistently held that a city must have latitude to experiment, at least at the outset, and that very little evidence is required. "The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, *so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses.*"

*Alameda Books*, 535 U.S. at 451, 122 S.Ct. 1728 (Kennedy, J., concurring in the judgment) (quoting *Renton*, 475 U.S. at 51-52, 106 S.Ct. 925 (emphasis added)).[FN30]

FN30. Even if the plurality had constituted the actual holding in *Alameda Books*, the plurality also reaffirmed *Renton* 's continued validity and explicitly refused to raise cities' evidentiary burden. To the contrary, the plurality *criticized* Justice Souter's dissent for "rais [ing] the evidentiary bar" by "ask[ing] the city to demonstrate, not merely by appeal to common sense, *but also with empirical data*, that its ordinance will successfully lower crime." *Alameda Books*, 535 U.S. at 439-41, 122 S.Ct. 1728 (plurality opinion) (emphasis added). The plurality explicitly rejected this requirement because it "would go too far in undermining our

settled position that municipalities must be given a 'reasonable opportunity to experiment with solutions' to address the secondary effects of protected speech." *Id.* at 439, 122 S.Ct. 1728.

Our opinion in *Peek-A-Boo Lounge* is consistent with Justice Kennedy's concurrence in *Alameda Books* and with *Renton.* There, a panel of this Court held that "[t]o satisfy *Renton*, any evidence 'reasonably believed to be relevant'-including a municipality's own findings, evidence gathered by other localities, or evidence described in a judicial opinion-may form an adequate predicate to the adoption of a secondary effects ordinance,"*Peek-A-Boo Lounge*, 337 F.3d at 1268, and we remanded that case with specific instructions to uphold the ordinance "provided that the County['s] ... judgment is still supported by credible evidence, *upon which [it] reasonably relies*,"*id.* at 1273 (emphasis added).

Here, Lollipop's argument that the City's evidence is flawed because it consists of "anecdotal" accounts rather than "empirical" studies essentially asks this Court to hold today that the City's reliance on anything but empirical studies based on scientific methods is unreasonable. This was not the law before *Alameda Books*, and it is not the law now. *See Alameda Books*, 535 U.S. at 451, 122 S.Ct. 1728 (Kennedy, J., concurring in the judgment) (reiterating that a city need not "conduct new studies or produce evidence independent of that already generated by other cities" (quoting *Renton*, 475 U.S. at 51-52, 106 S.Ct. 925)); *Pap's A.M.*, 529

U.S. at 300, 120 S.Ct. 1382 (plurality opinion) (criticizing the dissent for "ignor[ing] Erie's actual experience and instead requir[ing] ... an empirical analysis"). Rather, the City of Daytona Beach could reasonably rely upon "[c]ommon sense," *see* *Bellanca*, 452 U.S. at 718, 101 S.Ct. 2599, "its own experiences," *see* *Pap's A.M.*, 529 U.S. at 300, 120 S.Ct. 1382 (plurality opinion), "the experiences of ... other cities," *Renton*, 475 U.S. at 51, 106 S.Ct. 925, or city officials' local knowledge, *see* *Alameda Books*, 535 U.S. at 451-52, 122 S.Ct. 1728 (Kennedy, J., concurring in the judgment) ("The Los Angeles City Council knows the streets of Los Angeles better than we do. It is entitled to rely on that knowledge ...." (citations omitted)); *see also* *Pap's A.M.*, 529 U.S. at 297-98, 120 S.Ct. 1382 (plurality opinion).

To be sure, as the *Alameda Books* plurality admonished, the City cannot "get away with shoddy data or reasoning," and its evidence must "fairly support" its rationale. *See*535 U.S. at 438, 122 S.Ct. 1728 (plurality opinion). But this is simply another way of saying that the City's reliance on evidence supporting its rationale must be *reasonable.* Anecdotal evidence is not "shoddy" *per se.* At most, Lollipop's experts' studies suggest that the City *could* have reached a different conclusion during its legislative process about the relationship between adult theaters and negative secondary effects. But demonstrating the possibility of such an alternative does not necessarily mean that the City was barred from reaching other reasonable and different conclusions. *See* *G.M. Enters., Inc. v. Town of St.*

*Joseph*, 350 F.3d 631, 639 (7th Cir.2003) ("Although this evidence shows that the [town] might have reached a different and equally reasonable conclusion regarding the relationship between adverse secondary effects and sexually oriented businesses, it is not sufficient to vitiate the result reached in the [town's] legislative process."); *see also Alameda Books*, 535 U.S. at 437, 122 S.Ct. 1728 (plurality opinion) (noting that a city "does not bear the burden of providing evidence that rules out every theory ... that is inconsistent with its own").

Our review is designed to determine whether *the City's* rationale was a reasonable one, and even if Lollipop's demonstrates that another conclusion was also reasonable, we cannot simply substitute our own judgment for the City's. *See Peek-A-Boo Lounge*, 337 F.3d at 1273;*see also Barnes*, 501 U.S. at 583, 111 S.Ct. 2456 (Souter, J., concurring in the judgment) ("At least as to the regulation of expressive conduct, '[w]e decline to void [a statute] essentially on the ground that it is unwise legislation ....' " (quoting *O'Brien*, 391 U.S. at 384, 88 S.Ct. 1673 (alterations in original))); *Renton*, 475 U.S. at 52, 106 S.Ct. 925 ("It is not our function to appraise the wisdom of [the city's] decision to [regulate] adult theaters ...." (second alteration added and quotation marks omitted)); *cf. Alameda Books*, 535 U.S. at 451, 122 S.Ct. 1728 (Kennedy, J., concurring in the judgment) ("[C]ourts should not be in the business of second-guessing fact-bound empirical assessments of city planners.").

The City of Daytona Beach relied on, among other things, the Supreme Court's decisions in *Bellanca*, *LaRue*, *Barnes*, and *Pap's A.M.*; numerous police reports of criminal activity-including prostitution and assaults on police officers-in and around adult theaters; undercover police investigations that revealed numerous violations of City ordinances by adult theaters; the City's police chief's documentation of criminal activity in and around adult theaters; CAD data showing calls-for-service to police dispatchers from areas near adult theaters; extensive testimony taken in *Function Junction*, 705 F.Supp. at 547-48; studies conducted by Boston and Detroit showing that adult businesses tend to increase urban blight; studies of urban blight and decay in Daytona Beach; controlled laboratory studies showing a correlation between alcohol and sexual conduct; anecdotal accounts from local business owners about increased crime in and around adult theaters; and newspaper articles describing increases in problems related to nudity and alcohol surrounding events such as Spring Break and Black College Reunion. Because Lollipop's has failed to cast direct doubt on the aggregation of evidence that the City reasonably relied upon when enacting the challenged ordinances, we hold that the ordinances further a substantial government interest under *O'Brien*.

Moreover, a close examination of Lollipop's experts' studies calls into question their stated conclusion that they "cast grave doubt" on the City's evidence that adult theaters increase crime, and, equally

important, the studies do not even purport to address the City's evidence that adult theaters tend more generally to perpetuate urban blight and decay. First, one underlying methodological problem with both studies suggests that they cast little or no doubt on the City's evidence that nudity in establishments that serve alcohol encourages "prostitution, ... undesirable behavior ..., [and] sexual, lewd, lascivious, and salacious conduct among patrons and employees ... in violation of law and [en]dangers ... the health, safety and welfare of the public." *See* Ordinance 81-334 § 2. The experts' studies are based solely on CAD data, which, in lay terms, is essentially 911 emergency call data. Relying on such data to study crime rates is problematic, however, because many crimes do not result in calls to 911, and, therefore, do not have corresponding records in the City's CAD data.[FN31] This is especially true for crimes, such as lewdness[FN32] and prostitution, that the City sought to reduce by enacting the challenged ordinances. *See* Ordinance 02-496 § 5 (seeking to reduce "lewd and lascivious behavior, prostitution, sexual assaults and batteries, ... other criminal activity, [and the] degradation of women"); Ordinance 81-334 § 2 (seeking to reduce "prostitution, ... undesirable behavior, ... [and illegal] sexual, lewd, lascivious, and salacious conduct among patrons and employees" of adult theaters); *see also* Ordinance 03-375 § 4 (relying on legislative record for Ordinances 81-334 and 02-496).

FN31. *See* Richard McCleary & James W. Meeker, *Do Peep Shows "Cause" Crime? A Response to Linz,*

*Paul, and Yao,* 43 J. Sex Res. 194, 196 ("Modern criminologists do *not* use CFSs [i.e., calls for service or CAD data,] to measure crime or crime risk. In 2000-2004, the official journals of the two national criminology professional associations, *Criminology* and *Justice Quarterly,* published 245 articles. Of the 100 that analyzed a crime-related statistic, ... [only] two analyzed CFSs, but even in these two cases, CFSs were not used to measure crime or crime risk.").

FN32. Under Florida law, lewdness is at least a second-degree misdemeanor. *See*Fla. Stat. § 796.07.

Such crimes are often "victimless," in the sense that all of those involved are willing participants, and, therefore, they rarely result in calls to 911. College students on Spring Break are unlikely to call 911 after a wild night out on the town despite having participated in exactly the sort of activity that the City's nudity ordinances were enacted to reduce. Likewise, an encounter between a prostitute and a "john" rarely leads to a 911 call. By contrast, the City's "anecdotal" evidence may be a more accurate assessment of such crimes because it is not based on a data set that undercounts the incidents of such "victimless" crimes. *Cf. World Wide Video of Wash., Inc. v. City of Spokane,* 368 F.3d 1186, 1195-96 (9th Cir.2004) ("Anecdotal evidence and reported experience can be as telling as statistical data and can serve as a legitimate basis for finding negative secondary effects."(citation and alteration omitted)).[FN33]

FN33. We also note that at least three other circuits have rejected, for similar reasons, attempts by plaintiffs to use studies based on CAD data to cast direct doubt on an ordinance that the municipality supported with evidence of the sort relied upon by the City of Daytona Beach here. *See Gammoh v. City of La Habra*, 395 F.3d 1114, 1126-27 (9th Cir.2005); *G.M. Enters., Inc.*, 350 F.3d at 639;*SOB, Inc.*, 317 F.3d at 863 & n. 2. Interestingly, Daniel Linz, one of the experts hired by Lollipop's, also co-authored the studies found to be insufficient in two of these cases. *See G.M. Enters., Inc.*, 350 F.3d at 635-36, 639;*SOB, Inc.*, 317 F.3d at 863.

A second problem with Lollipop's experts' studies is that, even if the underlying CAD data fully reflected all of the conduct that Daytona Beach sought to reduce, the experts appear to draw conclusions that overstate the underlying data. For example, the study that focuses on Ordinance 81-334 concludes that "crimes against persons, crimes against property, and sex crimes, including both rape and prostitution[,] are not more common in areas with adult businesses than they are in similar control areas." (Experts' Report 2.) But the experts' own underlying data suggests otherwise-for three of the six pairs of study and control areas that the experts examined, "the study areas [i.e., areas with adult theaters,] *do show significantly higher rates of crime* than the control areas." (*Id.* at 29-30 (emphasis added).)

The experts attempt to explain away this result by pointing to the other three pairs-two show no "significant" difference between study and control areas, and one shows a significantly higher crime rate in the control area than the study area. The experts assert, without much discussion, that "[t]his mixed pattern" shows that "factors other than the presence of a nude cabaret are affecting rates of crime." (*Id.* at 30.) The experts are no doubt correct that factors other than the presence of adult theaters affect crime rates in Daytona Beach; crime is plainly caused by many factors. But that does little to undermine the City's conclusion that adult theaters *also* affect crime rates, especially when the experts' own analysis shows a statistically significant correlation between adult theaters and increased crime in half of the areas in the study.[FN34]

FN34. In addition to crimes against persons, crimes against property, and sex crimes, the study that focused on Ordinance 81-334 also analyzed "miscellaneous incidents that share in common that they involve violations of social norms ...., includ[ing] drunkenness, disorderly conduct, drug offenses, liquor law violations, and weapons complaints." (Experts' Report 27.) The study found a statistically significant increase in these so-called "norm violations" in areas with adult theaters compared to control areas, (*id.* at 33-34), which could be read to support part of the City's rationale for Ordinance 81-334. *See* Ordinance 81-334 § 2 (seeking to reduce "undesirable behavior" and "dangers to the health, safety and welfare of the

public"). Similarly, the study that focused on Ordinance 02-496 found a statistically significant increase in drug related offenses in areas with adult theaters compared to control areas. (Experts' Report 80, 105 tbl.10.)

Finally, both studies focus only on criminal activity and do not even purport to address the connection between adult theaters and urban blight. Ordinance 03-375, which amended Ordinance 02-496, was supported by testimony from *Function Junction* that adult theaters promote and perpetuate urban blight, which in Daytona Beach was characterized by "a significant percentage of deteriorating structures; a large number of small ... lots, which did not allow cars; a notable parking problem; a high incidence of crime, particularly, on the beachside; and a large percentage of antiquated, underground utility systems, such as drainage, water and sewer systems." 705 F.Supp. at 547. Lollipop's experts' studies examine only one of these conditions-high crime rates-and, notably, do not address at all the City's evidence that adult theaters tend to perpetuate these other features of urban blight. Although Lollipop's experts argue that the testimony provided in *Function Junction* was based on unreliable data and methodologically unsound analysis, we repeat that the City's reliance on such evidence need only have been *reasonable*, and it was.

In short, the CAD data relied on by both studies may substantially undercount incidents of many of the types of crime that the City sought to reduce;

the data that the studies did analyze show some statistically significant correlations between adult theaters and increased criminal activity; and the studies completely. fail to address evidence of increased urban blight and decay that the City reasonably relied on when enacting Ordinance 03-375. Thus, Lollipop's has failed to cast direct doubt on all of the evidence that the City reasonably relied on when enacting the challenged ordinances. *See* *Peek-A-Boo Lounge*, 337 F.3d at 1268 (noting that "the government must rely on at least *some* pre-enactment evidence" (emphasis in original)); *Wise Enters., Inc. v. Unified Gov't of Athens-Clarke County*, 217 F.3d 1360, 1364 (11th Cir.2000) (noting that a municipality "must have *some* factual basis" for its rationale (emphasis in original) (quotation marks omitted)); *see also* *World Wide Video*, 368 F.3d at 1195 (explaining that a city needs only "some" evidence to support its ordinances); *Baby Dolls Topless Saloons, Inc. v. City of Dallas*, 295 F.3d 471, 481 (5th Cir.2002) ("*Renton* teaches us that the government must produce *some* evidence of adverse secondary effects ...." (emphasis in original) (citation omitted)). Accordingly, we hold that Ordinances 81-334, 02-496, and 03-375 further a substantial government interest under *O'Brien*.[FN35]

FN35. Inasmuch as the district court concluded that Lollipop's had cast direct doubt on the City's evidence, it allowed the City to present post-enactment evidence in an effort to renew support for a theory justifying its ordinances. But because we have concluded that Lollipop's failed to cast

direct doubt on the City's evidence, there is no need to consider the City's post-enactment evidence. *See* *Alameda Books*, 535 U.S. at 438-39, 122 S.Ct. 1728 (plurality opinion) ("If plaintiffs fail to cast direct doubt on [the city's] rationale ..., the municipality meets the standard set forth in *Renton*.").

*B. Narrow Tailoring*

Under the fourth prong of the *O'Brien* test, an ordinance that imposes a reasonable time, place, or manner restriction on nudity must be "no greater than is essential to the furtherance of the government interest." *Pap's A.M.*, 529 U.S. at 301, 120 S.Ct. 1382 (plurality opinion). The Supreme Court has made clear, however, that *O'Brien* does not impose strict scrutiny's familiar "least restrictive means" requirement:

Lest any confusion on the point remain, we reaffirm today that a regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate, content-neutral interests but that it need not be the least restrictive or least intrusive means of doing so. Rather, the requirement of narrow tailoring is satisfied "so long as the ... regulation promotes a substantial government interest that would be achieved less effectively absent the regulation."

*Ward v. Rock Against Racism*, 491 U.S. 781, 798-99, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989) (footnote and citation omitted) (alteration in original); *see also* *Pap's A.M.*, 529 U.S. at 301-02, 120 S.Ct. 1382 (plurality opinion) (noting that

"least restrictive means analysis is not required" under *O'Brien*).

Here, the combined effect of Ordinances 81-334, 02-496, and 03-375 is that at least G-strings and pasties are required in all adult theaters regardless of location, and that Ordinance 02-496's slightly more modest clothing requirements apply at establishments that either serve alcohol or are located within 500 feet of an establishment that serves alcohol. Lollipop's argues that requiring more than G-strings and pasties at establishments that serve alcohol imposes a greater restriction than is necessary to further the City's substantial interest in reducing negative secondary effects:

> Appellants are claiming, *at a minimum*, that adults have a right to perform in pasties and G-strings where alcohol is served. Appellants further argue that the City's ordinances are unduly restrictive because they should allow pasties and G-strings at more locations. Appellants' claim should be understood in the broadest terms: government simply has no business telling adults what they can and cannot wear beyond a simple prohibition against nudity.

(Appellants'/Cross Appellees' Resp. & Reply Br. 22-23 (emphasis in original).)

We break no new ground in rejecting Lollipop's argument. It is well-established that a nudity ordinance that imposes a minimum requirement of G-strings and pasties is narrowly tailored under *O'Brien*. *See Pap's A.M.*, 529 U.S. at 301, 120 S.Ct.

1382 (plurality opinion) ("The requirement that dancers wear pasties and G-strings is a minimal restriction in furtherance of the asserted government interests, and the restriction leaves ample capacity to convey the dancer's erotic message."); *Barnes*, 501 U.S. at 587, 111 S.Ct. 2456 (Souter, J., concurring in the judgment) ("Pasties and a G-string moderate the expression to some degree, to be sure, but only to a degree. Dropping the final stitch is prohibited, but the limitation is minor when measured against the dancer's remaining capacity and opportunity to express the erotic message."); *id.* at 572, 111 S.Ct. 2456 (plurality opinion) ("Indiana's requirement that the dancers wear at least pasties and G-strings is modest, and the bare minimum necessary to achieve the State's purpose."); *cf.* *Peek-A-Boo Lounge*, 337 F.3d at 1274 (suggesting that the ordinance at issue, which did not leave erotic dancers free to perform wearing G-strings and pasties in any location in the county, was not narrowly tailored).

So too, the First Amendment does not prevent a city from limiting the venues where dancers may communicate their erotic message. An ordinance that "does not prohibit all nude dancing, but only restricts nude dancing in those locations where the unwanted secondary effects arise," is narrowly tailored. *Wise Enters.*, 217 F.3d at 1365. And an ordinance that defines those locations by reference to the presence of establishments that serve alcohol does not unduly restrict the ability to communicate an erotic message. *See* *Grand Faloon Tavern, Inc.*

*v. Wicker*, 670 F.2d 943, 948 (11th Cir.1982) ( "[N]ude entertainment necessarily involves a substantial degree of conduct, and ... any artistic or communicative elements present in such conduct are not of a kind whose content or effectiveness is dependent upon being conveyed where alcoholic beverages are served."). Thus, both the requirement that dancers wear G-strings and pasties in all adult theaters, and the additional requirement of clothing somewhat more modest[FN36] within 500 feet of establishments that serve alcohol, are narrowly tailored under *O'Brien*.

FN36. Lollipop's characterizes the additional required clothing as a "modest bikini," (Appellant's Initial Br. 46), or a "full bathing suit [ ]" (Appellant's Reply Br. 23). The City disputes this characterization, observing that "[a] 'modest bikini' certainly does not expose half of the lower female breast and two thirds of the buttocks." (Appellee's Initial Br. 52-53.) Regardless of whether the term "modest" accurately describes Ordinance 03-375's precise requirements, which are quoted above, *see supra* note 12, the City of Daytona Beach could impose those requirements within 500 feet of establishments that serve alcohol.

IV. *Conclusion*

Accordingly, we hold that all of the City's ordinances challenged in this lawsuit are constitutional. We AFFIRM the district court's decision upholding the City's zoning ordinances; we REVERSE the district court's decision striking

down Ordinances 81-334, 02-496, and 03-375; and we REMAND for further proceedings consistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART, and REMANDED.

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE ELEVENTH CIRCUIT**

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No. 06-12022-JJ

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Filed

DAYTONA GRAND, INC.,
a Florida corporation doing
business as Lollipop's Gentlemen's Club,
MILES WEISS,

SEP 07 2007

Plaintiffs-Appellants
Cross-Appellees,

JOHN DOE, et al.,

Plaintiffs,

versus

CITY OF DAYTONA BEACH, FLORIDA,
a municipal corporation,

Defendant-Appellee
Cross-Appellant.

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On Appeal from the United States District Court
for the
Middle District of Florida

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ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

Before: HULL and MARCUS, Circuit Judges, and BARZILAY, * Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

*/s/* Stanley Marcus
UNITED STATES CIRCUIT JUDGE

*Honorable Judith M. Barzilay, Judge, United States Court of International Trade, sitting by designation.

United States District Court,M.D. Florida,
Orlando Division.

DAYTONA GRAND, INC. d/b/a Lollipop's Gentlemen's Club, a Florida corporation, Miles Weiss and John Doe, Plaintiffs,
v.
CITY OF DAYTONA BEACH, FLORIDA, a municipal corporation, Defendant.
**No. 6:02-CV-1469ORL28KRS.**

Jan. 20, 2006.

## ORDER

Plaintiffs Daytona Grand, Inc., Miles Weiss, and John Doe ("Plaintiffs") operate Lollipop's Gentlemen's Club ("Lollipop's"), a nude dancing establishment located in Daytona Beach, Florida. Plaintiffs brought the instant action alleging that Defendant City of Daytona Beach's ("the City") Alcohol and Nudity Ordinance FN1 (hereinafter "Ordinance 81-334"), and Public Nudity Ordinance (hereinafter "Ordinance 02-496" FN2) violate the First and Fourteenth Amendments of the United States Constitution. In the alternative, Plaintiffs claim that they fall within an exemption contained in Ordinance 02-496 for bona fide live performances.

FN1. Def.'s Trial Ex. 1, Ord. No. 81-334 (codified as Code § 10-6) (hereinafter cited as "Ord. 81-334").

FN2. Ordinance 02-496 was subsequently amended by Ordinance 03-375. *See* Def.'s Trial Ex. 2, Ord. No. 02-496 (hereinafter cited as "Ord. 02-496"); Def.'s Trial Ex. 3, Ord. No. 03-375 (hereinafter cited as "Ord. 03-375").

Plaintiffs also brought a claim challenging the constitutionality of the City's scheme for zoning adult entertainment establishments. The parties filed cross-motions for summary judgment on this claim, which the Court resolved in favor of the City on December 1, 2004.[FN3] This case proceeded to trial on the remaining issues: (1) whether the City put forth sufficient evidence justifying the burdens that Ordinances 81-334 and 02-496 place on the erotic expression of nude dancing establishments in Daytona Beach; and (2) whether Plaintiffs are exempt from Ordinance 02-496 because the dances at Lollipop's are "bona fide live ... performance[s] ... wherein such nudity is expressive conduct incidental to and necessary for the conveyance or communication of a genuine message or public expression, and is not a guise or pretense utilized to exploit nudity for profit or commercial gain." [FN4] The Court held a six-day bench trial on these issues and now, in accordance with Federal Rule of Civil Procedure 52, issues the following opinion as its findings of fact and conclusions of law.

FN3. Order Denying Plaintiffs' Motion for Partial Summary Judgment, Granting in Part and Denying in Part Defendant's Motion for Summary Judgment, Doc. 119.

FN4. Ord. 02-496, § 62-184(a)(2)(exceptions).

## I. BACKGROUND.

In 1981, the City enacted Ordinance 81-334 together with adult business zoning regulations as part of a twofold approach to addressing what the City perceived to be the deleterious effects of adult businesses. While Ordinance 81-334 prohibited nudity and sexual conduct in alcohol-serving establishments, FN5 the City's zoning regulations designated certain districts as the only locations in which "adult theaters" could open as a matter of right.FN6

FN5. Ordinance 81-334 provides:
**Nudity, sexual conduct prohibited.**
(a) No person shall expose to public view such person's genitals, pubic area, vulva, anus, anal cleft or cleavage or buttocks or any simulation thereof in an establishment dealing in alcoholic beverages.
(b) No female person shall expose to public view any portion of her breasts below the top of the areola or any simulation thereof in an establishment dealing in alcoholic beverages.
(c) No person maintaining, owning, or operating an establishment dealing in alcoholic beverages shall suffer or permit any person to expose to public view such person's genitals, pubic area, vulva, anus, anal cleft or cleavage or buttocks or simulation thereof within the establishment dealing in alcoholic beverages.

(d) No person maintaining, owning, or operating an establishment dealing in alcoholic beverages shall suffer or permit any female person to expose to public view any portion of her breasts below the top of the areola or any simulation thereof within the establishment dealing in alcoholic beverages.
(e) No person shall engage in and no person maintaining, owning, or operating an establishment dealing in alcoholic beverages shall suffer or permit any sexual intercourse; masturbation; sodomy; bestiality; oral copulation; flagellation; sexual act which is prohibited by law; touching, caressing or fondling of the breasts, buttocks, anus or genitals; or the simulation thereof within an establishment dealing in alcoholic beverages.
(f) No person shall cause and no person maintaining, owning or operating an establishment dealing in alcoholic beverages shall suffer or permit the exposition of any graphic representation, including pictures or the projection of film, which depicts human genitals; pubic area; vulva; anus; anal cleft or cleavage; buttocks; female breasts below the top of the areola; sexual intercourse; masturbation; sodomy; bestiality; oral copulation; flagellation; sexual act prohibited by law; touching, caressing or fondling of the breasts, buttocks, anus, or genitals; or any simulation thereof within any establishment dealing in alcoholic beverages.

FN6. The Land Development Code of City of Daytona Beach defines an "adult theater," in pertinent part, as an establishment "which exhibits any motion picture, exhibition, live show,

representation, or other presentation which, in whole or in part, depicts nudity." Daytona Beach Land Development Code, Art. 2, § 3.1.

The City's support for the ordinances mainly consisted of "legislative findings of the city commission and supporting reports and documents provided by the police, indicating that nude dancing ... contributes to criminal activities." *City of Daytona Beach v. Del Percio*, 476 So.2d 197, 204 (Fla.1985). In addition, the City relied on the Supreme Court's decisions in *California v. LaRue*, 409 U.S. 109, 93 S.Ct. 390, 34 L.Ed.2d 342 (1972), and *New York State Liquor Authority v. Bellanca*, 452 U.S. 714, 101 S.Ct. 2599, 69 L.Ed.2d 357 (1981), for the proposition that municipalities "may prohibit various forms of actual and simulated nude and sexual conduct and depiction thereof within establishments dealing in alcoholic beverages." Ord. 81-334 (preamble).

The City's theory that adult entertainment establishments are the source of crime and other deleterious effects in Daytona Beach was first put to the test nearly twenty years ago in *Function Junction, Inc. v. City of Daytona Beach*, 705 F.Supp. 544, 546-48 (M.D.Fla.1987). Three adult entertainment establishments brought suit challenging the City's zoning restrictions on the location of adult theaters. In defense of its zoning scheme, the City presented the testimony of Gerald Langston ("Mr. Langston") and David Smith ("Mr. Smith"). Mr. Langston, an urban planner, testified that prior to enacting the ordinances, he

coordinated a task study group which determined that significant portions of Daytona Beach suffered from blight. He also testified, based on his education, experience, and personal knowledge of blight, as well as his consideration of urban blight studies in Detroit and Boston, that adult businesses were a cause of the blight. *Id.* at 547. Mr. Smith, an assistant state attorney, concurred with Mr. Langston's assessment and also testified that adult businesses were a source of drug and prostitution activity. *Id.* at 548. Aided by the testimony of Mr. Langston and Mr. Smith, the court in *Function Junction* concluded that there was a sufficient evidentiary basis for the City's zoning restrictions.

The City later became concerned that "certain businesses [were] evading the purpose of [Ordinance 81-334] by serving alcohol and presenting nude entertainment in the same building, with a separation between the areas where alcohol is served and nudity occurs but providing for access between the two areas." FN7 At the same time, the City was also concerned that the occurrence of lewd and lascivious acts within adult entertainment establishments was on the increase.FN8 Based in part on these concerns, the City enacted Ordinance 02-496, which provides:

FN7. Ord. 02-496 (preamble).

FN8. *Id.*

(a) It shall be unlawful for any person ten years of age or older to recklessly, knowingly, or intentionally appear in a public place, or to recklessly, knowingly, or intentionally cause or permit another person ten years of age or older to appear in a public place in a state of dress or undress such that any of the following body parts or portions thereof are exposed to view or are covered with anything other than a full and opaque covering which completely covers all of the described area:

(1) The male or female genitals, pubic area, or anal cleavage.

(2) The nipple and areola of the female breast; and in addition at least one-half of that outside surface area of the breast located below the top of the areola, which area shall be reasonably compact and contiguous to the areola.

(3) One-third of the male or female buttocks centered over the cleavage of the buttocks for the length of the cleavage. This area is more particularly described as that portion of the buttocks which lies between the top and bottom of the buttocks, and between two imaginary straight lines, one on each side of the anus and each line being located one-third of the distance from the anus to the outside perpendicular line defining the buttocks, and each line being perpendicular to the ground and to the horizontal lines defining the buttocks.

(b) It shall be unlawful for any person to recklessly, knowingly, or intentionally appear in a public place, or to recklessly, knowingly, or intentionally cause or permit another person to appear in a

public place in a manner as to show or display the covered male genitals in a discernibly turgid state. (c) Attire which is insufficient to comply with these requirements includes but is not limited to those items commonly known as G-strings, T-backs, dental floss, and thongs.

Ord. 02-496, § 62-183.

Less than a year after the City enacted Ordinance 02-496, the Eleventh Circuit issued an opinion that, among other things, called into question whether a nudity ordinance could ever constitutionally require nude dancers to wear more than G-strings, thongs, and pasties. *Peek-A-Boo Lounge of Bradenton, Inc. v. Manatee County*, 337 F.3d 1251, 1273 (11th Cir.2003) (citing *City of Erie v. Pap's A.M.*, 529 U.S. 277, 301, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000)). Shortly thereafter, the City enacted Ordinance 03-375, which amended Ordinance 02-496 to allow nude dancers to wear G-strings and pasties so long as the adult theaters in which they dance are not located within 500 feet of an establishment serving alcoholic beverages.[FN9] In addition to the evidence that it relied on in enacting Ordinance 02-496, the City's support for Ordinance 03-375 included Mr. Langston and Mr. Smith's testimony from *Function Junction;* prior court decisions upholding the City's ordinances; a series of studies authored by Dr. William George ("Dr. George") which discuss the combined effects of alcohol consumption and exposure to erotic stimuli; and a first-person account published in the *New*

*Statesman* magazine describing the effects of viewing erotica in a bar. Ord. 03-375 (preamble).

FN9. Section 14 of Ordinance 02-496 and Section 9 of Ord. No. 03-375 are codified in Article VI of the Daytona Beach Code of Ordinances. Ord. No. 02-496, § 14, 10-2-2002; Ord. No. 03-375, § 9, 8-20-2003.

## II. CLARIFICATION OF ISSUES FOR TRIAL AS SET FORTH IN THE COURT'S DECEMBER 1, 2004 SUMMARY JUDGMENT ORDER

Apart from dispensing with Plaintiffs' challenge to the City's zoning regulations, the Court's summary judgment order also clarified the issues critical to trying Plaintiffs' remaining claims. As more fully explained below, the Court determined that the key issue for trial on Plaintiffs' constitutional challenges to Ordinances 81-334 and 02-496 was whether the City could justify its reasons for enacting the two ordinances. The Court also determined that issues of material fact remained as to whether the erotic performances that Plaintiffs offer are "bona fide live ... performance[s] ... wherein such nudity is expressive conduct incidental to and necessary for the conveyance or communication of a genuine message or public expression, and is not a guise or pretense utilized to exploit nudity for profit or commercial gain."

## A. PLAINTIFFS' CONSTITUTIONAL CLAIMS

The Court's decision to deny the City's motion for summary judgment on Plaintiffs' constitutional challenges to Ordinances 81-334 and 02-496 was primarily guided by the Supreme Court's decision in *City of Los Angeles v. Alameda Books*, 535 U.S. 425, 122 S.Ct. 1728, 152 L.Ed.2d 670 (2002), and the Eleventh Circuit's decision in *Peek-A-Boo*. Under the analytical framework set forth in *Peek-A-Boo*, the threshold inquiry in reviewing a claim challenging an ordinance regulating erotic expression is whether the ordinance is a zoning ordinance or a general public nudity ordinance. 337 F.3d at 1264-65.[FN10] While the proper test for analyzing zoning ordinances is the standard for time, place, and manner regulations set forth in *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46-50, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986), *id.* at 1264, "content-neutral" nudity ordinances are analyzed under the four-part test established in *United States v. O'Brien*, 391 U.S. 367, 367-77, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968).

FN10. The *Peek-A-Boo* court explained that, although the Supreme Court "has sometimes collapsed the two categories into a single, overarching category of regulatory action targeting the negative 'secondary effects' of non-obscene adult entertainment," the analytical frameworks for evaluating the two types of regulations vary slightly. 337 F.3d at 1255, 1264-65.

[1] The parties agreed in their motions for summary judgment that Ordinances 81-334 and 02-496 are content-neutral nudity ordinances which require analysis under the *O'Brien* test. The *O'Brien* test provides that "public nudity ordinances [which] incidentally impact protected expression should be upheld if they (1) are within the constitutional power of the government to enact; (2) further a substantial government interest; (3) are unrelated to the suppression of free expression; and (4) restrict First Amendment freedoms no greater than necessary to further the government interest." 337 F.3d at 1264. As in *Peek-A-Boo*, the parties' dispute on summary judgment in this case centered on the second and fourth elements of the *O'Brien* test. In its summary judgment order, the Court rejected Plaintiffs' claim that the City's ordinances violate the fourth prong of the *O'Brien* test, but determined that material issues remained for trial on the question of whether the City's public nudity ordinances further a substantial government interest.

**1. *O'Brien's* requirement of furthering a substantial government interest**

*O'Brien's* requirement that a content-neutral nudity ordinance further a substantial government interest has long depended on the degree to which the ordinance is supported by evidence of a causal link between erotic expression and adverse "secondary effects." This evidentiary burden was,

until very recently, a decidedly "weak one," requiring only that a municipality rely on evidence that it reasonably believes to be relevant to the problem of "secondary effects," even if such evidence is merely that which other municipalities have relied on in the past. *City of Erie v. Pap's A.M.*, 529 U.S. 277, 296-97, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000). In *Alameda Books*, the Supreme Court raised the bar somewhat with its admonition that, although "a municipality may rely on any evidence that is reasonably believed to be relevant for demonstrating a connection between speech and a substantial, independent government interest," a municipality cannot "get away with shoddy data or reasoning." 535 U.S. at 438, 122 S.Ct. 1728 (citation and internal quotations omitted). Instead, "[t]he municipality's evidence must fairly support the municipality's rationale for its ordinance." *Id.*

Relying on *Alameda Books*, the Eleventh Circuit in *Peek-A-Boo* adopted the following burden-shifting approach for analyzing whether a nudity ordinance is sufficiently supported by evidence of "secondary effects": (1) the municipality must demonstrate that it relied on evidence that it reasonably believed to support a connection between erotic expression and adverse secondary effects; (2) plaintiffs may cast direct doubt on the municipality's rationale for enacting the ordinance, " 'either by demonstrating that the municipality's evidence does not support its rationale, or by furnishing evidence that disputes the municipality's factual findings' "; and (3) assuming

that the plaintiffs cast direct doubt on the municipality's rationale, " 'the burden shifts back to the [municipality] to supplement the record with evidence renewing support for a theory that justifies its [ordinance].' " *Id.* at 1265, 1269 (quoting *Alameda Books*, 535 U.S. at 438-39, 122 S.Ct. 1728).[FN11]

FN11. In *Peek-A-Boo*, the Eleventh Circuit found that, while the City satisfied its pre-enactment burden, the plaintiffs succeeded in casting "direct doubt" on the City's rationale for enacting the challenged ordinance with evidence that included "three expert studies specifically addressing local conditions ... which purported to show that there was no evidence connecting their businesses with negative secondary effects." 337 F.3d at 1270. The Eleventh Circuit also emphasized, moreover, that the City did not attempt "to counter the [plaintiffs'] evidence with local studies of its own" and thus failed to create "a battle of competing experts." *Id.* at 1272. In remanding the case, the Eleventh Circuit instructed the district court to "decide by a preponderance of the available evidence ... whether there remains credible evidence upon which the [City] could reasonably rely in concluding that the ordinance would combat the secondary effects of adult entertainment establishments." *Id.* at 1273. Finally, the court noted that, while the burden was on the county to renew the evidentiary basis for its ordinance, the district court was to take care "not to substitute its own judgment for that of the [City]." *Id.*

**2. Application of *O'Brien's* second prong**

In support of its motion for partial summary judgment, Plaintiffs submitted expert studies analyzing the evidentiary predicates for Ordinances 81-334 and 02-496. The studies reached two basic conclusions: (1) that the findings and reasoning relied upon by the City in enacting its ordinances were "shoddy"; and (2) that there is "no evidence of negative effects in the form of crime, especially sex crimes, stemming from the adult cabarets that feature nudity or topless entertainment in Daytona Beach" nor any evidence that the "appearance of persons in the nude or semi nude in public places such as adult cabarets ... increased incidents of lewd and lascivious behavior, prostitution or sexual assaults and batteries." Pl.'s Trial Ex. 1, Amended Experts' Reports on Secondary Effects Studies for Daytona Beach Ordinances (hereinafter cited as "Expert Reports"), at 2-3, 91, 188-89.

In response to Plaintiffs' studies, the City, rather than submitting studies of its own, simply submitted affidavits critiquing the methodology of Plaintiffs' experts. *See* Docs. 92 & 94. While failing to create "a battle of competing experts," the City's affidavits sufficed to create an issue for trial on the methodological soundness of Plaintiffs' studies. Doc. 119 at 22.

**B. PLAINTIFFS' CLAIM OF EXEMPTION FROM ORDINANCE 02-496**

Ordinance 02-496 provides that
The offense of public nudity or exposure ... shall not occur ... [w]hen the conduct of being nude cannot constitutionally be prohibited by this section because it constitutes a part of a bona fide live communication, demonstration, or performance by such person wherein such nudity is expressive conduct incidental to and necessary for the conveyance or communication of a genuine message or public expression, and is not a guise or pretense utilized to exploit nudity for profit or commercial gain....

Ord. 02-496, § 62-184(a)(2).[FN12] In opposition to the City's motion for summary judgment, Plaintiffs presented evidence in the form of affidavits that the dance routines of Lollipop's dancers are "a form of iconoclastic expression intended to make individuals think about issues involving sexuality, nudity and the role of women in society." *Id.* The City, on the other hand, failed to submit any evidence in support of its motion. *Id.* Accordingly, the Court had no choice but to deny the City's motion for summary judgment on Plaintiff's claim of exemption.

FN12. Contrary to the City's categorical contention that nude dancing in adult entertainment establishments could not qualify under the exemption contained in Ordinance 02-496, the

Court simply construed the exemption consistently with the stated intent of Ordinance 02-496:

> The stated intent of Ordinance 02-496 is to "protect and preserve the health, safety, and welfare of [Daytona Beach residents]." Thus, a reasonable interpretation of the ordinance's exceptions ... is that they exempt expressive displays of nudity that the City does not deem to threaten the [residents'] "health, safety, and welfare".... Viewed accordingly, the City presumably did not consider a "bona fide live communication, demonstration, or performance ... wherein such nudity is expressive conduct incidental to and necessary for the conveyance or communication of a genuine message" to cause the type of secondary effects that prompted [the] enactment of Ordinance 02-496.

Doc. 119 at 27 (bracketing not in original).

## III. TRIAL EVIDENCE

In order for Plaintiffs to prevail on their constitutional claims at trial, the burden-shifting scheme set forth in *Alameda Books* and *Peek-A-Boo* initially required them to cast direct doubt on the City's rationales for enacting Ordinances 81-334 and 02-496. Plaintiffs attempted to meet this initial burden primarily through the expert studies and testimony of Drs. Daniel Linz and Randy D. Fisher.[FN13] Pursuant to the guidance set forth in *Peek-A-Boo*, Plaintiffs' experts endeavored, first, to demonstrate "that the [City's] evidence does not support its rationale[s]" and, second, to undermine the City's factual findings through studies of their

own. 337 F.3d at 1271 (internal quotations and citation omitted).

FN13. The curricula vitae of Drs. Linz and Fisher easily establish their collective expertise in the study of secondary effects. *See* Expert Reports at 45-51, 190-216.

The City's case rested, in the main, on its pre-enactment evidence for Ordinances 81-334 and 02-496 and the efforts of its attorney to pierce holes in the methodology of Drs. Linz and Fisher on cross-examination. In anticipation of the need to renew support for a theory justifying its ordinances, the City did not present testimony from secondary effects experts of its own, but instead submitted evidence comparable in kind and quality to its pre-enactment evidence.

Plaintiffs also presented the testimony of Sean Bishop ("Mr. Bishop"), a manager at Lollipop's, and Janet Bassett ("Ms. Bassett"), a Lollipop's dancer, in an effort to demonstrate that the dances offered by Lollipop's are "bona fide live ... performance[s] ... wherein such nudity is expressive conduct incidental to and necessary for the conveyance or communication of a genuine message or public expression."

## A. ORDINANCE 81-334

### 1. The City's pre-enactment evidence

Plaintiffs' experts observed that there was absolutely no empirical data in the Prostitution Overview to support the general allegations contained within it concerning the presence of prostitution and other criminal activity occurring in and around adult entertainment establishments. Expert Reports, at 6-7.

**ii. The Willits Report and accompanying CAD data**

Plaintiffs' experts asserted that the only statistical evidence offered in support of the Willits Report-CAD data from November 1980 to July 1981-lacked reliability for the following reasons:

> The data ... cover areas containing only half of the adult cabarets [in Daytona Beach at the time]. Thus it is selective and incomplete. The [Willits Report] provides no comparison data against which [the data of incidents occurring in and around adult entertainment establishments] can be evaluated. There is no attempt at statistical summary and certainly no attempt to test for statistical significance.

*Id.* at 3. In light of these limitations, Plaintiffs' experts concluded that the CAD data is "shoddy" and, therefore, unreliable proof of the assertions contained within the Willits Report. *See id.*

### iii. Reports of arrests for prostitution and assaults on police officers

Plaintiffs' experts concluded that the City's reports of prostitution arrests suffered from "many of the same problems" as the CAD data accompanying the Willits Report, including the lack of any comparison data. *Id.* Plaintiffs' experts also noted that the reports of assaults on police officers "all describe assaults that occurred at businesses other than 'topless bars.' " *Id.*

## b. Plaintiffs' secondary effects study

In addition to concluding that the City lacked reliable evidence to support its rationale for enacting Ordinance 81-334, Plaintiffs' experts also "performed an empirical study of [their] own to examine the relationship between the presence of adult cabarets in areas and the rates of crime in those areas." *Id.* Using data supplied by the Daytona Beach Police Department, Plaintiffs' experts examined CAD data covering the 44-month time period prior to the enactment of Ordinance 81-334. *Id.* at 19-20. Comparing "rates of crime in study areas that had adult cabarets and control areas that did not," FN15 Plaintiffs' experts "found no statistically significant differences in overall rates of crime FN16 between study and control areas." *Id.* at 3-4 (footnote not in original). Accordingly, Plaintiffs' experts concluded that "the presence of adult caberets cannot be seen as a

cause of [the crimes identified in Ordinance 81-334]." *Id.* at 4.

FN15. Plaintiffs' experts explained that "[c]ontrol areas were matched as best as possible with study areas to minimize differences between them that might represent alternative interpretation of differences in crime rates." Expert Reports, at 3-4, 20-26.

FN16. Plaintiffs' experts compared the crime rates for crimes against persons, crimes against property, and sex crimes, such as rape and prostitution. *See* Expert Reports, at 4, 20-21.

**B. ORDINANCE 02-496 (AS AMENDED BY ORDINANCE 03-375)**

**1. The City's pre-enactment evidence**

In enacting Ordinance 02-496, the City purportedly sought to curtail "lewd and lascivious behavior, prostitution, sexual assaults and batteries, ... other criminal activity, .. [the] degradation of women, and ... activities which break down family structures and values." Ord. 02-496 (preamble). As support for its rationale, the City relied on the following evidence: (1) local news articles describing nudity during college events and its effects on the community; and (2) narrative reports by detectives and special unit officers describing instances in which dancers at adult entertainment

establishments simulated sexual acts, made sexual contact with customers and with each other, and, in one case, propositioned an officer for sex. Doc. 170, Tabs 11-14.

In support of Ordinance 03-375, which amended Ordinance 02-496, the City relied on: (1) Mr. Smith and Mr. Langston's testimony from *Function Junction;* (2) Dr. George's conclusions based on his controlled studies of individuals viewing erotica while drinking alcohol or believing that they were drinking alcohol; and (3) an article published in the *New Statesman* in which the author describes how his experience at an adult entertainment establishment encouraged him to have sex with a prostitute.

**2. Plaintiffs' attempt to cast direct doubt on the City's rationale**

Much as they had approached their critique of the City's rationale for enacting Ordinance 81-334, Plaintiffs' experts attempted to cast doubt on the City's rationale for enacting Ordinances 02-496 and 03-375, first, by systematically analyzing the evidence which the City submitted in favor of the ordinances and, second, by empirically demonstrating that nude entertainment is not the source of adverse secondary effects in Daytona Beach.

**a. Plaintiffs' critique of the City's evidence**

Plaintiffs' critique of the City's rationales for enacting Ordinances 02-496 and 03-375 centered on three pieces of evidence: (1) the narrative reports of law enforcement officials describing sexual acts occurring in adult entertainment establishments; (2) Mr. Smith and Mr. Langston's testimony from *Function Junction*; and (3) Dr. George's studies.

**i. Narrative reports of law enforcement**

Plaintiffs' experts concluded that the narrative police reports were simply "the unsystematically generated ... result of the police stepping up law enforcement." FN17 Expert Reports, at 62. Plaintiffs' experts also observed that:

FN17. Stepped-up law enforcement simply refers to concentrating law enforcement resources on a particular crime, location, or person.

No comparative information was presented to allow the City to determine if the problems coming to the attention of the police regarding criminal activity were lesser, the same or greater than problems associated with other businesses in comparable locations [and] the information on crime activity did not cover a sufficient period of time to allow for a stable estimate of crime activity.
*Id.*

**ii. Mr. Smith and Mr. Langston's Testimony**

Dr. Linz concluded that Mr. Smith and Mr. Langston's testimony fell prey to three fatal methodological flaws:

> First, [their testimony did] not compare information on crimes or property values with appropriately selected control areas. Second, what data was examined was not collected over a sufficient period of time to rule out momentary fluctuations in crime events. Third, reliable sources of data from the police were not used and information based on stepped-up police enforcement was relied upon.

*Id.* at 163.

**iii. Dr. George's studies**

In an extensive critique of Dr. George's laboratory studies, Dr. Linz concluded that the results of the studies cannot not be generalized to the real world setting of nude dancing. Dr. Linz reasoned as follows:

> Dr. George's work illustrates one of the most serious problems with laboratory experimentation. This problem, generally speaking, is known as the problem of "external validity." It relates to the generalizability of experimental findings to the real world....
>
> While there are many reasons for an experiment to lack generalizability [,] one of the most common ways generalizability is jeopardized is when there

is an interaction between the testing situation and the experimental stimulus. When there is such an interaction, the effect of interest is produced only in the laboratory not in the real world.

Behaviors might only occur in the laboratory because of the types of people recruited for the experiment, or because a set of cues given inadvertently to subjects by the setting or experimenter, or because a procedure or set of stimulus materials invented by the experimenter causes subjects to behave in ways they would not in the world outside the laboratory. In addition, even if the behavior in question is not caused by an interaction between the testing situation and experimental stimulus[,] we are still left to wonder if the outcome or dependent variable in the study is analogous to the real world phenomenon of interest.

Dr. George's studies suffer from all of these external validity problems. There are many interactions between testing situation and experimental stimulus that operate in Dr. George's studies that serve to limit his findings to the social situation he himself has produced in the laboratory. This renders the findings inapplicable to the real world situation of alcoholic beverage consumption in an adult nightclub that features topless or nude entertainment.

*Id.* at 167-68.

Dr. Linz specifically noted the following external validity problems with Dr. George's studies of subjects drinking alcohol while viewing erotica: (1)

the use of college-age males who consume more than two drinks per day as subjects; FN18 (2) the showing of pornography, including scenes depicting intercourse, fellatio, and cunnilingus; and (3) the absence of real-world inhibitors "such as admonishments from friends not to get too drunk, warning from authority figures or at the very least lack of tacit approval by authority figures for excessive drinking, or even the lack of money to 'drink as much' as one wished." *Id.* at 167. Dr. Linz also made the more obvious observation that the bulk of Dr. George's studies did not even involve the use of subjects drinking alcohol.

FN18. This phenomenon, Dr. Linz observed, was probably the result of subject participation bias:
[The] students have been recruited with a procedure in which they must first be informed of the possibility that they will be given alcohol and permitted at that point to excuse themselves from participation. The men who eventually end up taking part in the study presumably underwent informed consent procedures. This means that they were informed of the fact that they may be asked to consume alcohol during the course of the experiment. Proper procedure then permits them to withdraw their participation if this was a problem. We do not know how many men declined to participate at that stage. We may assume however that those who did not wish to drink on school premises or who had study or other obligations may have declined participation in the study.

Expert Reports, at 169.

**b. Plaintiffs' secondary effects study**

Despite concluding that the City could not have reasonably enacted Ordinances 02-496 and 03-375 with the evidence it had before it, Plaintiffs' experts nonetheless sought "to test the assumption that adult cabarets are associated with negative secondary effects" by performing "an extensive and detailed empirical study of criminal activity in and around [adult cabarets] in Daytona Beach." *Id.* at 56. Utilizing data provided by the Daytona Beach Police Department, Drs. Linz and Fisher determined "that there is no[ ] support for the City of Daytona Beach's theory that nudity is associated with increases in sex crime incidents such as prostitution or sexual assault." *Id.* at 57. En route to this conclusion, Plaintiffs' experts employed the following methodological approach:

> We first ask[ed]: Does the presence of an adult cabaret in a neighborhood increase the occurrence of crime in Daytona Beach?
>
> In ... answer[ing] this question we considered the entire city using census blocks as the unit of study. We examined demographic variables previously used by criminologists and found to be related to criminal activity, such as a local area's population, age structure (especially the presence of young adults) and race/ethnic composition. We also examined indicators of social disorganization such as housing vacancies and female-headed households. Finally, we included a variable that

measured the number of alcohol retail sale establishments in each block.

These variables, as expected, were statistically strongly related to crime events in the final analysis. We are able to account for crime events in Daytona Beach with a relatively high level of accuracy (explaining approximately 60 percent of the variability). The social disorganization variables and especially the presence of [ ] alcohol beverage retail sale establishments in the blocks accounts largely for this explanatory power. *The presence of an adult cabaret in the census block accounted for an insubstantial amount of explanatory power.*

We then asked: Does the presence of adult cabarets contribute to increased crime in the local vicinity of these establishments. We focused on the areas surrounding the adult cabarets (1000 foot radius). We found that far from being the source of crime activity, only one to three and [a] half-percent of the crime events could be attributed to the adult cabarets themselves. Instead, *other businesses* in the area, primarily alcohol-serving establishments that do *not* feature adult entertainment, accounted for far more crime events.

Because the City of Daytona Beach specifically maintained that the primary justification for [its] regulation of nudity was because it was associated with increases in prostitution and sexual assaults we undertook a separate set of analyses using each sex crime type as an outcome variable.

*Id.* at 67.[FN19] Using this approach, Plaintiffs' experts specifically found "that often the adult cabarets accounted for zero or near zero percent of the sex crime activity in the near vicinity." *Id.*

FN19. In more precise terms, the methodological approach taken by Plaintiffs' experts involved two procedures:
First, the calls for service to the City of Daytona Beach Police Department across census blocks as defined by the 2000 United States Census Bureau [were] examined. Then, [they] hone[d] in on the areas immediately surrounding the adult cabarets.
The first strategy [was] to measure the presence or absence of other community features identified at the census block level, city-wide, that may [have been] related to criminal activity and then, once these factors [were] statistically controlled, [the experts] examine[d] the impact of the presence of an adult business on crime activity. These variables [were] entered into a statistical analysis [in order to] explain as much variability in criminal activity as possible. A term [was] then [ ] entered for the presence or absence of an adult cabaret in the neighborhood.
Secondly, [the experts] follow[ed] up the census block analyses with a more focused analysis on the areas immediately surrounding the adult cabarets (1000 foot radius). Regardless of what [they found] at the census block level, [the experts posited that] it may still be the case that the crime incidents that occur in the block containing the adult cabaret, however small or large, is clustered at the adult

cabaret address. This more focused analysis by specific address [was] undertaken to determine if the adult cabarets have required special attention from the police or if other businesses and entertainment establishments in the immediate vicinity [were] more often the source of police attention.
Expert Reports, at 67.

## C. THE CITY'S POST-ENACTMENT EVIDENCE IN SUPPORT OF ORDINANCES 81-334 AND 02-496

The City submitted the following post-enactment evidence at trial: (1) testimony from Daytona Beach detective Harry Oakley regarding his observations of oral sex between dancers, drug activity, and propositions for oral sex at adult entertainment establishments in Daytona Beach; (2) a sworn statement from a citizen that he was offered sex at an adult entertainment establishment in Daytona Beach; (3) testimony from another citizen that upon observing sexual acts at Plaintiffs' establishment she was accosted by bouncers and physically removed from the premises; (4) reports of at least three more possible batteries at Plaintiffs' establishment; and (5) the testimony of the City's urban planner, Richard Preoletti, that prostitution does not exist in the parts of Daytona Beach where there are no adult entertainment establishments.

For much the same reasons as he (along with Dr. Linz) concluded that the City's pre-enactment

evidence was shoddy, Dr. Fisher testified that the City's post-enactment evidence of batteries and other crimes occurring at adult entertainment establishments is "essentially meaningless." Doc. 166 at 100. Dr. Fisher explained that:

[T]he main problem ... with the data is that there's nothing to compare it to. [The City] [only focused] on adult cabarets or topless bars.... There is no relevant comparison. [The City] didn't look at other kinds of businesses [.] [S]pecifically they didn't look at ... alcohol only bars.

*Id.* at 101. Dr. Fisher similarly found that Mr. Preoletti's testimony failed "to provide ... an objective test like the correlation co-efficient that tells us whether [adult entertainment and prostitution] are related and ... [whether] the variable that really accounts for [any] correlation [is] alcohol establishments." *Id.* at 104.

Plaintiffs additionally asserted in their closing argument that the City's evidence of batteries is irrelevant because battery was not one of the original justifications for the City's ordinances.

## D. PLAINTIFFS' EVIDENCE IN SUPPORT OF THEIR CLAIM OF EXEMPTION UNDER ORDINANCE 02-496

Mr. Bishop testified that dancers often choose their own music and outfits based on the themes of their dance performances. *Id.* at 66-67. Ms. Bassett similarly testified that she carefully considers what

costumes and music are appropriate for her dance routines. She further testified that her dancing "is an expression of [herself] and how [she] feel[s]" and that she tries "to bring [her] emotions and ... expression out through [her] dance and music." *Id.* at 86. In disputing the "bona fide" nature of the dance performances offered by Plaintiffs, the City emphasized in its closing argument that the dancers at Plaintiffs' establishment "take their clothes off for money." Doc. 170 at 26.

## IV. COURT'S FINDINGS AND CONCLUSIONS OF LAW

### A. PLAINTIFFS' CONSTITUTIONAL CHALLENGES

Like *Peek-A-Boo,* this case does not present "a battle of competing experts." While Plaintiffs have submitted a sophisticated and detailed expert study that both critiques the City's pre-enactment evidence and empirically examines the relationship between adult businesses and crime in Daytona Beach, the City has consistently maintained that it need not perform any such study. The City instead rests the fate of its ordinances on two arguments: (1) that Plaintiffs' study fails to cast direct doubt on the rationales underlying the ordinances; and (2) that even if Plaintiffs have succeeded in casting direct doubt, the City's evidence at trial renews support for a theory justifying the ordinances.

**1. Whether Plaintiffs' study has succeeded in casting direct doubt on the City's rationales for enacting Ordinances 81-334 and 02-496**

The City does not dispute either that Drs. Fisher and Linz are experts in the study of secondary effects or that the results of their studies are scientifically sound. Instead, the City contends that Plaintiffs' studies of CAD data fail to fully account for the rationales supporting the enactment of Ordinances 81-334 and 02-496.

With respect to Ordinance 81-334, the City contends:
In 1981, the City didn't rely on police dispatch records to determine whether there was a problem-they were one item in the record but the City also looked at prostitution arrest locations, the Police Chief listed specific concerns including murders and missing persons connected with the trade, lewd and lascivious behavior inside, customers assaulted and robbed, dancers assaulted and raped, prostitution inside and out, and the ineffectiveness of current law enforcement tools in curbing these problems. A citizen described the impact on her family restaurant when two neighboring bars went topless, including exposure to extreme violence and drugs. While the "police reports and testimony" of officers from 1981 which the Chief referred to as substantiating the incidents in his memo are not available 25 years later, [P]laintiffs have presented nothing to refute the Chief's credibility. Police dispatch records are not on point. Unreported

incidents, activity by detectives, special units, State Attorney investigators, none of that is recorded in CAD [data], and CAD designations often do not accurately reflect real crime. We do have [Smith's] 1987 testimony [in which] he testified from personal knowledge of prostitution and drug activity associated with the bars, his RICO cases including one of the businesses operating brothels (a record not in CAD). And finally, the City's concerns about its economic future and measures necessary to improve prospects were addressed by [Langston] in [his] 1987 testimony and before this court.

Doc. 170 at 23-24.

Regarding Ordinance 02-496, the City similarly asserts:

In [2002 and 2003,] the concern was not excessive calls for services ...; no, [the] concerns were lewd behavior inside the clubs; nudity, lewdness, and disruptive behavior on the City's streets; economic harm from the City's reputation as a town where anything goes; [and] criminal behavior attracted by the clubs.... [T]he CAD studies do not "cast direct doubt" on the credibility of the police reports (undercover activity is not in CAD). Dr. George provides a scientific explanation for behavior spiraling out of control consistent with the effects observed by police, and supports the legislative judgment that alcohol and nudity should be separated.

Doc. 170 at 24-25.

[2] The City's arguments misapprehend the approach of Plaintiffs' study. Consistent with the framework set forth in *Alameda Books* and *Peek-A-Boo*, Plaintiffs' study initially assessed whether the City's evidence of secondary effects fairly supported the enactment of Ordinances 81-334 and 02-496. In concluding that the City's evidence of secondary effects was "shoddy," Plaintiffs' experts relied mainly on basic methods of scientific reasoning, not CAD data. To illustrate, Plaintiffs' experts did not-nor did they have any need to-use CAD data to conclude that Dr. George's study "is fraught with external validity problems and [its] leap from laboratory to real world is tenuous at best." Expert Reports, at 188. Nor did they make use of CAD data to conclude that the assertions contained in the Willits Report and in Mr. Smith and Mr. Langston's testimony lack validity because they are based on severely flawed methodology. Indeed, the only time that Plaintiffs' experts used CAD data to assess the quality of the City's evidence it was simply to show that the opinions contained in the Willits Report were belied by the very CAD data that the report relied upon.

CAD data aside, Plaintiffs have succeeded in their attempt to cast direct doubt on the City's rationales for its ordinances. As persuasively demonstrated by Plaintiffs' expert studies, the City's pre-enactment evidence consists either of purely anecdotal evidence or opinions based on highly unreliable data. Most notably, the City's evidence lacks data which would allow for a comparison of

the rate of crime occurring in and around adult entertainment establishments with the rate of crime occurring in and around similarly situated establishments. Absent the context that such a comparison might provide, the City's data is, as Plaintiffs assert, "meaningless." As for Dr. George's studies, "external validity problems" render their results irrelevant to the very precise issue of whether there is a causal relationship between specific crimes and the combined effect of drinking alcohol and viewing nude dancing. Although Dr. George is assuredly an expert in something, he has never empirically studied secondary effects, much less secondary effects in Daytona Beach.[FN20]

FN20. If Dr. George's laboratory studies were accepted as constitutionally sufficient evidence of a link between secondary effects and the combination of drinking alcohol and viewing nude entertainment, the studies, given their highly general nature, would presumably function as a legal basis for *any* municipality to enact an alcohol and nudity ordinance. In the Court's estimation, such a result would render the legal precedent culminating in *Alameda Books* and *Peek-A-Boo* mere mockery.

The doubt created solely by virtue of Plaintiffs' systematic critique of the City's evidence is only cemented by the conclusion of Plaintiffs' experts that, based on the study of CAD data, nude dancing in Daytona Beach is not the source of crime. At

trial, the City had the opportunity to undermine the methodology of Plaintiffs' experts but did not do so. Viewed in the very best of lights, the only thing that the City was able to establish at trial is that some criminologists performing secondary effects studies may prefer to rely on data other than CAD data. This does not mean, of course, that CAD data is an unreliable data source. To the contrary, the only testimony of record on this point is that of Dr. Linz, who testified that, notwithstanding any disagreement among criminologists, reliance on CAD data in secondary effects studies is accepted by the criminological community. This is evinced not only by Dr. Linz's testimony but also by the fact that the studies of Dr. Linz have been peer reviewed and published. Given these facts, the Court can only conclude that the methodology of Plaintiffs' experts is sound and that the conclusions they reach regarding the secondary effects of nude dancing in Daytona Beach are, therefore, valid.

**2. Whether the City has submitted evidence renewing support for a theory justifying its ordinances**

The evidence the City offered at trial to renew support for a theory justifying its ordinances suffers from the same flaws as its pre-enactment evidence. Owing perhaps to a stubborn refusal to accept the evolution in the law effected by *Alameda Books* and *Peek-A-Boo*, the City's post-enactment evidence, like its pre-enactment evidence, consists of either anecdotal evidence or opinions based on

highly unreliable data. As Dr. Fisher observed, the City fails, once more, to compare any of its data of incidents occurring in and around nude dancing establishments with data of such incidents occurring in and around similarly situated establishments.

In failing to renew support for a theory justifying its ordinances, the City leaves the Court with only one option: to declare Ordinances 81-334 and 02-496 unconstitutional and strike them accordingly. To reach a contrary result would be at clear odds with the plain import of *Peek-A-Boo* that gone are the days when a municipality may enact an ordinance ostensibly regulating secondary effects on the basis of evidence consisting of little more than the self-serving assertions of municipality officials. *See also Flanigan's Enters., Inc. v. Fulton County, Ga.*, 242 F.3d 976, 986 (11th Cir.2001) ( "[W]here the right to free speech is at issue, the government bears the burden of showing that the articulated concern has more than merely speculative factual grounds, and that it actually was a motivating factor.").[FN21]

FN21. The Eleventh Circuit's decision in *Peek-A-Boo* complements well its earlier decision in *Flanigan's Enters., Inc. v. Fulton County, Georgia*, 242 F.3d 976, 986 (11th Cir.2001). In *Flanigan's*, the Eleventh Circuit held that the county did not have reasonable justification for amending its nudity ordinance "when [its] own studies negated the very interests it purportedly sought to prevent."

*Id.* at 986. This holding, albeit a decidedly sensible one, may have created an unintended incentive for municipalities: to refrain from performing local empirical studies lest their preconceived ideas about the effects of nude dancing prove false. Yet, for reasons which this Order make clear, *Peek-A-Boo* all but erased any such incentive.

## B. PLAINTIFFS' CLAIM OF EXEMPTION

Because the Court has found the City's ordinances unconstitutional, there is no longer occasion to determine whether the dances offered by Plaintiffs fall within the exemption set forth in Ordinance 02-496. Even if there were such occasion, principles of ripeness would likely preclude review. FN22 *See Konikov v. Orange County*, 410 F.3d 1317, 1322 (11th Cir.2005) (noting that one of the functions of the ripeness requirement is to ensure that claims are "sufficiently mature" and "issues [are] sufficiently defined and concrete[ ] to permit effective decisionmaking by the court").

FN22. Were only Ordinance 02-496 at issue in this case, the constitutional avoidance doctrine might have counseled in favor of initially, and perhaps only, addressing Plaintiffs' claim of exemption. *See Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347, 56 S.Ct. 466, 80 L.Ed. 688 (1936) (Brandeis, J., concurring) ("If a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory

construction or general law, the Court will decide only the latter."). Unlike Ordinance 02-496, however, there are no exemptions contained in Ordinance 81-334 which would have enabled the Court to potentially avoid the constitutional questions raised in this case.

## V. CONCLUSION

For all of the foregoing reasons, it is **ORDERED, ADJUDGED, AND DECREED** as follows:

1. Judgment is entered in favor of Plaintiffs Daytona Grand, Inc. and Miles Weiss on their claims that Ordinance 81-334, codified as Code § 10-6 of the Daytona Beach City Code, and Ordinance 02-496, as amended by Ordinance 03-375, violate the First and Fourteenth Amendments of the U.S. Constitution, because the City of Daytona Beach lacks sufficient evidence that the ordinances further a substantial interest in preventing secondary effects associated with adult entertainment.

2. Ordinances 81-334, codified as Code § 10-6 of the Daytona Beach City Code, and Ordinance 02-496, as amended by Ordinance 03-375, are hereby **DECLARED UNCONSTITUTIONAL AND ARE THEREFORE STRICKEN**.

3. The Clerk of the Court is directed to leave this case open for thirty (30) days in order for the Court and the parties to resolve any remaining issues.

**DONE** and **ORDERED** in Chamber, Orlando, Florida this 20th day of January, 2006

/ s / JOHN ANTOON II
United States District Judge

**Sec. 10-6. Nudity, sexual conduct prohibited.**

(a) No person shall expose to public view such person's genitals, pubic area, vulva, anus, anal cleft or cleavage or buttocks or any simulation thereof in an establishment dealing in alcoholic beverages.

(b) No female person shall expose to public view any portion of her breasts below the top of the areola or any simulation thereof in an establishment dealing in alcoholic beverages.

(c) No person maintaining, owning, or operating an establishment dealing in alcoholic beverages shall suffer or permit any person to expose to public view such person's genitals, pubic area, vulva, anus, anal cleft or cleavage or buttocks or simulation thereof within the establishment dealing in alcoholic beverages.

(d) No person maintaining, owning, or operating an establishment dealing in alcoholic beverages shall suffer or permit any female person to expose to public view any portion of her breasts below the top of the areola or any simulation thereof within the establishment dealing in alcoholic beverages.

(e) No person shall engage in and no person maintaining, owning, or operating an establishment dealing in alcoholic beverages shall suffer or permit any sexual intercourse; masturbation; sodomy; bestiality; oral copulation; flagellation; sexual act which is prohibited by law; touching, caressing or fondling of the breasts,

buttocks, anus or genitals; or the simulation thereof within an establishment dealing in alcoholic beverages.

(f) No person shall cause and no person maintaining, owning or operating an establishment dealing in alcoholic beverages shall suffer or permit the exposition of any graphic representation, including pictures or the projection of film, which depicts human genitals; pubic area; vulva; anus; anal cleft or cleavage; buttocks; female breasts below the top of the areola; sexual intercourse; masturbation; sodomy; bestiality; oral copulation; flagellation; sexual act prohibited by law; touching, caressing or fondling of the breasts, buttocks, anus, or genitals; or any simulation thereof within any establishment dealing in alcoholic beverages.

**Although not codified in the City's Code of Ordinances, provides the City's rationale for Ordinance 81-334's enactment:**

It is hereby found that the acts prohibited in Section 1 above encourage the conduct of prostitution, attempted rape, rape, murder, and assaults on police officers in and around establishments dealing in alcoholic beverages, that actual and simulated nudity and sexual conduct and the depiction thereof coupled with alcohol in public places begets undesirable behavior, that sexual, lewd, lascivious, and salacious conduct among patrons and employees within establishments dealing in alcoholic beverages

results in violation of law and dangers to the health, safety and welfare of the public, and it is the intent of this ordinance to prohibit nudity, gross sexuality, and the simulation and depiction thereof in establishments dealing in alcoholic beverages.

## ARTICLE VI. PUBLIC NUDITY

### Sec. 62-181. Intent.

(a) It is the intent of this article to protect and preserve the health, safety and welfare of the people of The City of Daytona Beach by prohibiting any person from recklessly, knowingly, or intentionally appearing nude in a public place, or recklessly, knowingly, or intentionally causing or permitting another person to appear nude in a public place within the city, subject to the exceptions provided in section 62-184.

(b) The city commission has further expressed its intent and findings in Ordinance No. 02-496, adopting this article.

(Ord. No. 02-496, § 14, 10-2-2002)

### Sec. 62-182. Definitions.

When used in this article the following words and terms, unless the context indicates a different meaning, shall be interpreted as follows:

*Breast* means the human female mammary gland.

*Buttocks* means the area at the rear of the body which lies between two imaginary lines running parallel to the ground when a person is standing, the first or top such line drawn at the top of the cleavage of the nates and the second or bottom line drawn at the lowest visible point of this cleavage or

the lowest point of the curvature of the fleshy protuberance, whichever is lower, and between two imaginary lines on each side of the body, which lines are perpendicular to the ground and to the horizontal lines described above, and which perpendicular lines are drawn through the point at which each nate meets the outer side of each leg. See *Geneas v. Willets,* 715 F. Supp. 334 (M.D. Fla. 1989), *aff'd* 911 Fed. 2d 579 (11th Cir. Fla. 1990), *cert. den. sub nom. Function Junction, Inc. v. Crowe,* 499 U.S. 955 (1991).

*Public place provided or set apart for nudity* means an enclosed public restroom, an enclosed functional shower or locker room facility, an enclosed sauna, a motel room or hotel room designed and intended for sleeping accommodations, or at the location of a bona fide private club whose membership as a whole engages in social nudism or naturalism (a nudist resort or camp), and any similar public places in which nudity is necessarily and customarily expected outside of the home and the sphere of privacy constitutionally protected therein.

*Public place* means any location open to the common and general use, participation, or enjoyment of the public where the public is present or likely to be present, or any location where the public is invited and is free to go upon special or implied invitation, or any location where a person may reasonably be expected to be observed by the public. A public place includes but is not limited to a street, sidewalk, park, beach, business or commercial establishment (whether for profit or not

for profit and whether open to the public at large or entrance is limited by a cover charge or membership requirement), bottle club, hotel, motel, restaurant, night club, country club, or cabaret, or a meeting facility utilized by a religious, social, fraternal, or similar organization.

(Ord. No. 02-496, § 14, 10-2-2002)

**Sec. 62-183. Public nudity and exposure of certain body parts prohibited.**

(a) It shall be unlawful for any person ten years of age or older to recklessly, knowingly, or intentionally appear in a public place, or to recklessly, knowingly, or intentionally cause or permit another person ten years of age or older to appear in a public place in a state of dress or undress such that any of the following body parts or portions thereof are exposed to view or are covered with anything other than a full and opaque covering which completely covers all of the described area:
(1) The male or female genitals, pubic area, or anal cleavage.

(2) The nipple and areola of the female breast; and in addition at least one-half of that outside surface area of the breast located below the top of the areola, which area shall be reasonably compact and contiguous to the areola.

(3) One-third of the male or female buttocks centered over the cleavage of the buttocks for the

length of the cleavage. This area is more particularly described as that portion of the buttocks which lies between the top and bottom of the buttocks, and between two imaginary straight lines, one on each side of the anus and each line being located one-third of the distance from the anus to the outside perpendicular line defining the buttocks, and each line being perpendicular to the ground and to the horizontal lines defining the buttocks.

(b) It shall be unlawful for any person to recklessly, knowingly, or intentionally appear in a public place, or to recklessly, knowingly, or intentionally cause or permit another person to appear in a public place in a manner as to show or display the covered male genitals in a discernibly turgid state.

(c) Attire which is insufficient to comply with these requirements includes but is not limited to those items commonly known as G-strings, T-backs, dental floss, and thongs.

(d) Body paint, body dye, tattoos, latex, tape, or any similar substance applied to the skin surface, any substance that can be washed off the skin, or any substance designed to simulate or which by its nature simulates the appearance of the anatomical area beneath it, is not full and opaque covering as required by this section.

(Ord. No. 02-496, § 14, 10-2-2002)

**Sec. 62-184. Exceptions.**

(a) The offense of public nudity or exposure as set forth in section 62-183 shall not occur in any of the following instances:

(1) When a person appears nude in a public place provided or set apart for nudity, and such person is nude for the sole purpose of performing a legal function that is customarily intended to be performed within such public place, and such person is not nude for the purpose of obtaining money or other financial gain for such person or for another person or entity; or

(2) When the conduct of being nude cannot constitutionally be prohibited by this section because it constitutes a part of a bona fide live communication, demonstration, or performance by such person wherein such nudity is expressive conduct incidental to and necessary for the conveyance or communication of a genuine message or public expression, and is not a guise or pretense utilized to exploit nudity for profit or commercial gain. See, for example,*City of Erie v. Paps,* 529 U.S. 277 (2000); *Barnes v. Glen Theatre, Inc.,* 501 U.S. 560 (1991); *Gatena v. County of Orange,* 80 F. Supp. 2d 1331 (M.D. Fla. 1999), aff'd 226 F. 3d 649 (11th Cir. 2000), *cert. den.* 531 U.S. 1113 (2001); *Cafe 207, Inc. v. St. Johns County,* 856 F. Supp. 641 (M.D. Fla. 1994), *aff'd* 66 F. 3d 272 (11th 1995), *cert. den.* 517 U.S. 1156 (1996); *Hoffman v. Carson,* 250 So.2d 891 (Fla. 1971); or

(3) When the conduct of being nude cannot constitutionally be prohibited by this section because it is otherwise protected by the United States Constitution or the Florida Constitution.

(b) Adult theaters. See Peek-a-Boo Lounge v. Manatee County, 11th Cir. (July 15, 2003) (petition for rehearing pending).

(1) In the course of the presentation of erotic dance or other artistic expression which is entitled to first amendment protection within a fully enclosed structure legally established as an adult theater as defined in the Land Development Code:

a. The breast covering required by subsection 62-183(a)(2) shall not be required, except that nipples and areolae shall be covered.

b. The buttocks covering required by subsection 62-183(a)(3) shall not be required, and subsection 62-183(c) shall not apply.

(2) In order to achieve and promote the purpose and intent of the provisions of section 10-6, City Code, this exemption shall not be applicable to an adult theater which:

a. Is located in the same structure as an establishment dealing in alcoholic beverages as defined in section 10-1, City Code, unless the closest point of the premises of the alcoholic

beverage establishment is more than 500 feet from the boundary line of the adult theater use; or

b. Is located under the same roof as an establishment dealing in alcoholic beverages as defined in, section 10-1, City Code unless the closest point of the premises of the alcoholic beverage establishment is more than 500 feet from the boundary line of the adult theater use; or

c. Shares any wall, floor, or ceiling with an establishment dealing in alcoholic beverages as defined in section 10-1, City Code; or

d. Shares an entry area with an establishment dealing in alcoholic beverages as defined in section 10-1, City Code; or

e. Provides for or permits the interior passage of customers directly or indirectly between it and an establishment dealing in alcoholic beverages as defined in section 10-1, City Code, whether or not a separate cover or admission fee is charged; or

f. Is located adjacent or next door to an establishment dealing in alcoholic beverages as defined in section 10-1, City Code; or

g. Is located within 500 feet of an establishment dealing in alcoholic beverages as defined in section 10-1, City Code, measured from property line of one use to property line of the other use, including parking areas and other appurtenances associated with each use; or

h. Is not legally authorized to operate as an adult theater.

(3) The purpose of subsection 62-184(b)(2) is to maintain a separation between adult theaters and alcoholic beverages establishments, and it shall be interpreted and applied in a reasonable manner to effectuate this purpose. If any subsection a--h of section 62-184(b)(2) is held to be invalid or unconstitutional, it shall be severed from and shall not affect the validity of the remaining subsections.

(Ord. No. 02-496, § 14, 10-2-2002; Ord. No. 03-375, § 9, 8-20-2003)

**Sec. 62-185. Penalty.**

Any person violating these provisions shall be punished as provided in section 1-14 of the City Code.

(Ord. No. 02-496, § 14, 10-2-2002)

**Sec. 62-186. Provisions supplemental.**

These provisions are supplemental and in addition to any other provisions of law regulating nudity or exposure in public places or alcoholic beverage establishments.

(Ord. No. 02-496, § 14, 10-2-2002)

FILED
JAN 9 - 2008
OFFICE OF THE CLERK
SUPREME COURT

No. 07-768

# In The
# Supreme Court of the United States

DAYTONA GRAND, INC. and MILES WEISS,
*Petitioners*,

v.

CITY OF DAYTONA BEACH, FLORIDA,
*Respondent*.

*On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit*

## BRIEF IN OPPOSITION

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## QUESTION PRESENTED

Did the Eleventh Circuit correctly hold that the City of Daytona Beach's ordinances prohibiting public nudity and regulating near-nudity in establishments that serve alcohol further a substantial government interest under *United States v. O'Brien*, 391 U.S. 367 (1968) and its progeny?

## TABLE OF CONTENTS

Question Presented ..... i

Table of Contents ..... ii

Table of Authorities ..... iii

Counterstatement of the Facts ..... 1

Counterstatement of Proceedings Below ..... 2

Reasons for Denying the Writ ..... 10

I. This Case is Not a Proper Vehicle for Resolving the Questions Presented ..... 10

II. The Petition's Claims of Significant Lower Court Confusion and Circuit Splits Lack Merit ..... 12

A. This Court's Jurisprudence Concerning the Regulation of Sexually Oriented Businesses Has Not Engendered Significant Confusion Among Lower Courts ..... 13

B. Daytona Grand Has Not Identified Any Circuit Split Emanating From the Opinion Below ..... 20

Conclusion ..... 29

## TABLE OF AUTHORITIES

**Cases**

*Abilene Retail #30, Inc. v. Board of Comm'rs of Dickinson County, Kan.*,
492 F.3d 1164 (10th Cir. 2007) ..... 24, 25

*Barnes v. Glen Theatre, Inc.*,
501 U.S. 560 (1991) ..... *passim*

*California v. LaRue*,
409 U.S. 109 (1972) ..... 4, 15

*City of Daytona Beach v. Del Percio, Inc.*,
476 So. 2d 197 (Fla. 1985) ..... 1

*City of Erie v. Pap's A.M.*,
529 U.S. 277 (2000) ..... *passim*

*City of Los Angeles v. Alameda Books, Inc.*,
535 U.S. 425 (2002) ..... *passim*

*City of Renton v. Playtime Theatres, Inc.*,
475 U.S. 41 (1986) ..... 14, 15

*Commonwealth of Kentucky v. Jameson*,
215 S.W.3d 9 (Ky. 2006) ..... 21

*Function Junction v. City of Daytona Beach*,
705 F. Supp. 544 (M.D. Fla. 1987),
*aff'd* 864 F.2d 792 (11th Cir. 1988) ..... 1

*Geneas v. Willets*,
715 F. Supp. 334 (M.D. Fla. 1989),
*aff'd* 911 F.2d 579 (11th Cir. 1990) . . . . . 1

*Lujan v. Defenders of Wildlife*,
504 U.S. 555 (1992) . . . . . 11

*Marks v. United States*,
430 U.S. 188 (1977) . . . . . 19

*Morgan v. City of Daytona Beach*,
678 So. 2d 352 (Fla. Ct. App. 1996) . . . . . 1

*New York State Liquor Authority v. Bellanca*,
452 U.S. 714 (1981) . . . . . 4, 26

*Nixon v. Shrink Missouri Gov't PAC*,
528 U.S. 377 (2000) . . . . . 25

*R.V.S. v. L.L.C. v. City of Rockford*,
361 F 3d 402 (7th Cir. 2004) . . . . . 28, 29

*Young v. American Mini Theatres, Inc.*,
427 U.S. 50 (1976) . . . . . 4

*SOB, Inc. v. County of Benton*,
317 F.3d 856 (8th Cir. 2003) . . . . . 19

*United States v. O'Brien*,
391 U.S. 367 (1968) . . . . . *passim*

*Ward v. Rock Against Racism*,
491 U.S. 781 (1989) . . . . . 9, 26, 28

*World Wide Video of Washington, Inc. v. City of Spokane*,
368 F.3d 1186 (9th Cir. 2004) ..... 23

**Federal Rules**

Sup. Ct. R. 10 ..... 12, 19

## COUNTERSTATEMENT OF THE FACTS

In 1981, after years of increasing urban blight and economic decline—and testimony concerning illicit sexual behavior, drug use, and other crimes in and around adult businesses—the City of Daytona Beach adopted various zoning and regulatory ordinances in an effort to reduce these adverse secondary effects. App. 3. The City's zoning ordinances permitted adult theaters to open only in the City's business automotive zoning districts and prohibited them from locating within certain distances of churches, schools, parks, playgrounds, or other sexually oriented businesses. App. 3. The City's regulatory measure, Ordinance 81-334, prohibited nudity and sexual conduct in establishments that serve alcohol. App. 10.

These ordinances were challenged multiple times in state and federal courts, and were upheld as constitutional in each case. *City of Daytona Beach v. Del Percio, Inc.*, 476 So. 2d 197 (Fla. 1985) (finding the record "replete with the legislative findings of the city commission and supporting reports and documents provided by the police, indicating that nude dancing in Daytona Beach contributes to criminal activities"); *Function Junction v. City of Daytona Beach*, 705 F. Supp. 544 (M.D. Fla. 1987), *aff'd* 864 F.2d 792 (11th Cir. 1988) (upholding zoning ordinance); *Geneas v. Willets*, 715 F. Supp. 334 (M.D. Fla. 1989), *aff'd* 911 F.2d 579 (11th Cir. 1990) (upholding alcohol ordinance); *Morgan v. Daytona Beach*, 678 So. 2d 352 (Fla. Ct. App. 1996) (upholding zoning ordinance).

By 2001, the City realized that multiple bars were exploiting a loophole in Ordinance 81-334 by

separating alcohol and nudity within a single structure but allowing for ready access between the two areas. The City was also concerned that lewd and lascivious conduct in adult theaters was increasing and that nudity in parks, streets, and other public places was especially a problem during events such as Spring Break. Consequently, the City enacted Ordinance 02-496, which generally prohibited nudity in any public place. The explicit purpose of Ordinance 02-496 was to reduce "lewd and lascivious behavior, prostitution, sexual assaults and batteries, other criminal activity, the degradation of women, and activities that break down family structures and values." App. 13. In 2003, the City enacted Ordinance 03-375, which amended Ordinances 02-496 to allow erotic dancers to wear G-strings and pasties "within a fully enclosed structure legally established as an adult theater" that is more than 500 feet from an establishment that serves alcohol. Within 500 feet of an alcohol-serving establishment, however, Ordinance 02-496 requires dancers to wear clothing somewhat more modest than G-strings and pasties. App. 17.

## COUNTERSTATEMENT OF PROCEEDINGS BELOW

In December 2003, Daytona Grand filed this lawsuit in federal district court challenging the constitutionality of the City's zoning, nudity, and alcohol ordinances. The district court granted summary judgment to the City that its zoning ordinance is constitutional and that its nudity and alcohol ordinances are narrowly tailored. The district court ruled, however, that there was a genuine issue of material fact whether the three nudity ordinances

furthered a substantial government interest. App. 19-20.

During a bench trial, Daytona Grand attempted to cast direct doubt on the City's rationale for the nudity ordinances by presenting the testimony of two expert witnesses who conducted empirical studies using data provided by the City. The experts concluded that adult theaters in Daytona Beach had no statistically significant effect on crime rates, and that the City's evidence to the contrary was "shoddy" and "meaningless." The district court agreed and found that

> the City's pre-enactment evidence consists either of purely anecdotal evidence or opinions based on highly unreliable data. Most notably, the City's evidence lacks data which would allow for a comparison of the rate of crime occurring in and around adult entertainment establishments with the rate of crime occurring in and around similarly situated establishments. Absent the context that such a comparison might provide, the City's data is, as Plaintiffs assert, "meaningless."

App. 20-21. Finding that the additional evidence the City provided to renew support for its ordinances was similarly flawed, the district court held that the three nudity ordinances violated the First Amendment because they did not further a substantial government interest. App. 21.

On appeal, the Eleventh Circuit affirmed the district court's holding that the City's adult zoning

ordinance is constitutional. App. 27. On the issue of a substantial government interest, the Eleventh Circuit found that the City easily carried its initial burden to show that the nudity and alcohol ordinances furthered its interest in reducing the negative secondary effects associated with adult theaters by producing a substantial body of evidence reasonably believed to be relevant to combating those problems. For example, in the text of Ordinance 81-334, the City found that nudity and sexual conduct combined with alcohol in public places begets crime and other undesirable behavior that results in dangers to the public health, safety, and welfare. App. 38.

To support this rationale, Ordinance 81-334 cites two Supreme Court decisions, *New York State Liquor Authority v. Bellanca*, 452 U.S. 714 (1981) (*per curiam*) and *California v. LaRue*, 409 U.S. 109 (1972), both of which upheld prohibitions on nude dancing in establishments that serve alcohol. App. 38-39. This Court has approved municipal reliance on evidence of negative secondary effects presented in previous judicial opinions:

> Because the nude dancing at Kandyland is of the same character as the adult entertainment at issue in *Renton*, *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 49 L. Ed. 2d 310, 96 S. Ct. 2440 (1976), and *California v. LaRue*, 409 U.S. 109, 34 L. Ed. 2d 342, 93 S. Ct. 390 (1972), it was reasonable for Erie to conclude that such nude dancing was likely to produce the same secondary effects. And Erie could reasonably rely on the evidentiary foundation set forth in *Renton* and

> *American Mini Theatres* to the effect that secondary effects are caused by the presence of even one adult entertainment establishment in a given neighborhood. See *Renton v. Playtime Theatres, Inc.*, 475 U.S. at 51-52 (indicating that reliance on a judicial opinion that describes the evidentiary basis is sufficient).

*City of Erie v. Pap's A.M.*, 529 U.S. 277, 296-97 (2000).

In addition, the legislative history of Ordinance 81-334 shows that the City relied on its own experiences to support its rationale. That legislative history includes a list of arrests for prostitution and other crimes in or near many Daytona Beach adult businesses, the City police chief's memorandum listing incidents that occurred near topless bars, police dispatch records from areas around adult businesses, police reports of 83 prostitution arrests and seven arrests for assault and battery of a police office near an adult theater, and local business owners' firsthand accounts of crime around adult businesses. App. 39-40.

The other two nudity ordinances were similarly replete with evidence. The City enacted Ordinance 02-496, a general public nudity ordinance, to protect and preserve the health, safety, and welfare of the City's residents in the face of its findings that public nudity increases lewd and lascivious behavior and crime, encourages degradation of women, and facilitates other activities that break down family structures and values. To support these findings, the City relied on newspaper articles describing incidents of public nudity and other crimes during Spring Break,

detectives' reports of sexual conduct and nudity by dancers at adult theaters, and this Court's decisions *Pap's A.M.*, 529 U.S. 277, and *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991). App. 41.

In support of Ordinance 03-375, the City relied on testimony in a prior federal court lawsuit challenging the City's zoning ordinances. In that prior case, the City's director of planning and redevelopment offered expert testimony that, based on his education, experience, knowledge of blight in Daytona Beach, and his participation in drafting the ordinances, live nude and seminude entertainment businesses promote and perpetuate urban decay and that adult businesses have impacted crime in the area surrounding Daytona Beach. App. 5-6, 43. Similarly, an assistant state attorney in Daytona Beach testified that there definitely were more drug and prostitution offenses in topless bars than in other bars. App. 6, 43. In addition, the City relied on several expert studies concluding that (1) erotica led males to drink more alcohol than otherwise, (2) young men who believed they had consumed alcohol displayed greater interest in viewing violent and/or erotic images and reported increased sexual arousal, and (3) participants perceived a woman who they believed had consumed alcohol to be significantly more aggressive, impaired, sexually available, and likely to engage in foreplay and intercourse. Finally, Ordinance 03-375 expressly incorporates all the evidence on which the City relied to support the other two nudity ordinances. In the face of this overwhelming evidence supporting the findings and rationales, the Eleventh Circuit found that the City easily carried its initial burden to show that the three nudity ordinances furthered its interest in

reducing the negative secondary effects associated with adult theaters. App. 44.

Daytona Grand attempted to cast direct doubt on the nudity ordinances by presenting the testimony of two expert witnesses. In general, the experts criticized the City's evidence as shoddy, meaningless, and unreliable. App. 45. To buttress the criticisms, the experts conducted two empirical studies using data provided by the City. In the first study, the experts compared 911 emergency call data from areas in Daytona Beach that had adult theaters to control areas that did not. The experts claimed to find no statistically significant differences in overall rates of crime between study and control areas and so concluded that they cast grave doubt on the City's findings that the combination of nude dancing and alcohol increases crime. App. 46. In the second study, the experts concluded that other demographic variables—population, age structure, racial and ethnic composition, housing vacancies, female-headed households, and the number of alcohol retail sale establishments—were statistically strongly related to crime whereas adult theaters accounted for an insubstantial amount of crime. App. 47.

After thoroughly considering all of Daytona Grand's experts' testimony, the Eleventh Circuit found it insufficient to cast direct doubt on the aggregation of evidence that the City reasonably relied upon when enacting the nudity ordinances for three reasons. App. 53. First, the experts' studies are based solely on 911 emergency call data. Reliance on such data to measure crime rates is problematic, the court found, because many crimes do not result in calls to 911 and

therefore do not have corresponding records in the City's data. This is especially true for many crimes the ordinances specifically target—such as prostitution, lewd and lascivious behavior, and salacious sexual conduct among patrons and employees of adult theaters—because all people involved in such crimes are willing participants who rarely call 911. App. 54-55. In this case, the City's evidence included numerous undercover investigation reports documenting lewd and lascivious conduct, illicit sexual behavior, and solicitation for prostitution. For this reason, the Eleventh Circuit found that the data relied on by both studies may substantially undercount many of the crimes the City sought to reduce. App. 58-59.

Second, the experts drew conclusions that overstated the underlying data. Indeed, some portions of the experts' studies actually support the City's rationale for its ordinances. For example, in the study focusing on Ordinance 81-334, three of the six study areas (areas containing adult theaters) actually showed significantly higher rates of police activity than the control areas (areas not containing any adult theaters). App. 56. The same study also found a statistically significant increase in "norm violations"—drunkenness, disorderly conduct, drug offenses, liquor law violations, and weapons complaints—in areas with adult theaters compared to control areas. Moreover, the study focusing on Ordinance 02-496 found a statistically significant increase in drug related offenses in areas with adult theaters compared to control areas. App. 57 n.34.

Third, both studies focused only on crime and did not address at all the City's evidence that adult

theaters tend to perpetuate other features of urban blight, including deteriorating structures, small lots, parking problems, and antiquated underground utility systems. App. 58. For all these reasons, the Eleventh Circuit held that Daytona Grand failed to cast direct doubt on all the evidence on which the City reasonably relied in enacting the challenged ordinances; therefore, the ordinances further a substantial government interest. App. 58-59.

Finally, the Eleventh Circuit upheld the nudity ordinances as narrowly tailored. Under those ordinances, dancers in adult theaters located more than 500 feet from establishments that serve alcohol must wear at least pasties and G-strings, whereas dancers in adult theaters located within 500 feet of alcohol establishments must wear slightly more modest clothing. App. 61. Daytona Grand argued that this latter requirement was not narrowly tailored. Citing *Ward v. Rock Against Racism*, 491 U.S. 781, 798-99 (1989), the court noted that a regulation is narrowly tailored so long as it "promotes a substantial government interest that would be achieved less effectively absent the regulation." App. 60. Following this Court's decisions in *Pap's A.M.* and *Barnes*, the Eleventh Circuit proclaimed it well established that a nudity ordinance that imposes a minimum requirement of G-strings and pasties is narrowly tailored. App. 61. The court ruled that the First Amendment does not prevent a city from limiting the venues where dancers may communicate their erotic message. The court noted that the City's ordinances do not prohibit all nude dancing, but only restrict it in locations within 500 feet of alcohol establishments, which is where the unwanted secondary effects arise

as documented by the extensive legislative record. The Eleventh Circuit followed its own precedent holding that regulations on nude dancing near alcohol establishments do not unduly restrict the ability of dancers to communicate their erotic message. Accordingly, the court held that the City's ordinances are narrowly tailored. App. 62-63.

After the Eleventh Circuit denied a petition for rehearing *en banc* App. 66), Daytona Grand filed its petition for a writ of certiorari in this Court. Daytona Grand does not contest the Eleventh Circuit's ruling that the zoning ordinances are constitutional; instead, it only asks this Court to review the Eleventh Circuit's holdings that the nudity ordinances serve a substantial government interest and are narrowly tailored.

## REASONS FOR DENYING THE WRIT

### I. THIS CASE IS NOT A PROPER VEHICLE FOR RESOLVING THE QUESTIONS PRESENTED.

As an initial matter, this case is not a proper vehicle for deciding the questions presented by Daytona Grand's petition. Daytona Grand, doing business as Lollipop's Gentlemen's Club, seeks to continue offering nude dancing in its establishment at 639 Grandview Avenue in Daytona Beach, which it has been doing illegally since October 2000. App. 28-29.

Adult theaters (nude dancing establishments) like Lollipop's, however, are not allowed at Lollipop's location as it is in neither a BA nor M-5 zoning

district. App. 22. The district court upheld the City's zoning requirements for adult businesses, and Daytona Grand appealed that determination to the Eleventh Circuit. App. 20-21. The Eleventh Circuit affirmed the district court on this issue, and Daytona Grand did not petition for review of that determination. This means that the City's zoning ordinance—which prohibits nude dancing establishments at Lollipop's location—is intact.

To maintain a federal lawsuit, a plaintiff must demonstrate (1) an injury that is (2) "fairly traceable to the defendant's allegedly unlawful conduct" and that is (3) "likely to be redressed by the requested relief." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). These three factors constitute "the irreducible constitutional minimum of standing." *Id.*

Daytona Grand's petition suffers from a fatal redressability problem: even if Daytona Grand were to prevail against the City's nudity and alcohol ordinances—the only ordinances addressed in the petition, Pet. at 2—it could not operate an adult business with nude dancing at its present location. The City's zoning ordinance prevents Daytona Grand from doing so, and Daytona Grand did not petition for review of this independent bar to Daytona Grand's desire to offer nude dancing at its present location. Nor does the record reveal any intent by Daytona Grand to operate an adult theater in another location in Daytona Beach. Thus, the Court should deny the petition for certiorari.

## II. THE PETITION'S CLAIMS OF SIGNIFICANT LOWER COURT CONFUSION AND CIRCUIT SPLITS LACK MERIT.

A petition for a writ of certiorari will be granted only for compelling reasons, such as when a U.S. court of appeals has decided an important federal question (1) in a way that conflicts with the decision of another U.S. court of appeals or a state court of last resort, (2) that has not been, but should be, settled by this Court, or (3) that conflicts with relevant decisions of this Court. A petition is rarely granted when the asserted error consists of the misapplication of a properly stated rule. *See* United States Supreme Court Rule 10.

It bears noting that Daytona Grand's petition is strikingly similar to the recent petition filed in *Edward Green Jameson v. Commonwealth of Kentucky*, No. 06-1697. Indeed, one of the questions presented, and many of the paragraphs purporting to assert reasons for granting the writ, in Daytona Grand's petition are taken *verbatim* from the petition in *Jameson*. Accordingly, this Court should deny Daytona Grand's petition for all the reasons it denied the *Jameson* petition on October 1, 2007.

Beyond these flaws, Daytona Grand's petition fails to establish any compelling reason to grant the writ. Indeed, Daytona Grand fails to identify *any* portion of the Eleventh Circuit's ruling that has not been, but should be, settled by this Court, or that conflicts with relevant decisions of this Court. Instead, Daytona Grand argues that the Court's plurality decisions have engendered confusion in the lower courts—without disclosing that those courts unanimously agree on

what constitutes the holding of each of this Court's decisions and that the lower courts are quite consistent in the results that they reach. Contrary to Daytona Grand's suggestion, the opinion below does not conflict with the decision of another U.S. court of appeals or a state court of last resort. Finally, while Daytona Grand alleges circuit splits on other topics within the area of regulation of sexually oriented businesses, neither the facts nor opinion in this case give rise to those questions or present a proper vehicle for this Court to address them. For all these reasons, this Court should deny the petition for a writ of certiorari.

### A. THIS COURT'S JURISPRUDENCE CONCERNING THE REGULATION OF SEXUALLY ORIENTED BUSINESSES HAS NOT ENGENDERED SIGNIFICANT CONFUSION AMONG LOWER COURTS.

Daytona Grand's primary argument supporting its petition for writ of certiorari is that "the highly-fractured nature of this Court's plurality opinions regarding the 'secondary effects' doctrine has led to significant confusion and conflict in the lower courts." Pet. 6. Although several of this Court's decisions in this area of law are indeed plurality opinions, the resulting jurisprudence is clear and consistent.

In *United States v. O'Brien*, 391 U.S. 367 (1968), this Court set forth the standard for evaluating restrictions on expressive conduct under the First Amendment:

> [A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

391 U.S. at 377.

The Court applied this standard in the adult business context in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986). There, the Court considered a time, place, and manner regulation that required adult theaters to locate more than 1,000 feet from residential zones, dwellings, churches, parks, and schools. *Id.* at 46. The Court stated that "content-neutral" speech regulations—those that are justified without reference to the content of the regulated speech—"are acceptable so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication." *Id.* at 47-48.

With regard to whether the ordinance served a substantial governmental interest, the Court held that Renton was entitled to rely on the experiences of other cities and the findings summarized in judicial decisions about the secondary effects associated with sexually oriented businesses. *Id.* at 51-52. The Court stated the city was not required to rely on local studies, nor was it required to conduct new studies or to produce evidence independent from that produced

by other cities. *Id.* Under *Renton*, a regulation satisfies the First Amendment "so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses." *Id.*

Five years later, in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991), the Court applied *O'Brien* analysis to a state statute prohibiting public nudity when it was challenged on First Amendment grounds by establishments that desired to provide totally nude dancing. 501 U.S. at 567 (plurality opinion); *id.* at 582 (Souter, J., concurring). Despite the lack of *any* legislative history or record evidence concerning secondary effects, the nudity ban in *Barnes* was upheld because it served a current governmental interest in preventing the negative secondary effects associated with nude dancing. *Id.* at 582-83 (Souter, J., concurring).

Relying on *Renton*, the controlling opinion in *Barnes* concluded that live nude dancing would likely produce the same negative secondary effects as the type of entertainment at issue in previous Court decisions (*i.e.*, *Renton*, *American Mini Theatres*, *LaRue*), and that the statute therefore served a substantial government interest in preventing such adverse effects. *Id.* at 584. The opinion agreed with "*Renton*'s recognition that legislation seeking to combat the secondary effects of adult entertainment need not await localized proof of those effects," and it held that regulating adult businesses due to their correlation with secondary effects is unrelated to the suppression of free expression. *Id.* at 584-86.

More recently, in *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000), this Court applied *O'Brien* analysis and the evidentiary standard set forth in *Renton* to conclude that a ban on public nudity, which required erotic dancers to wear pasties and g-strings, furthered the government interest in preventing harmful secondary effects and did not violate the First Amendment. The court approved the city's reliance on previous judicial decisions that described the evidentiary basis for similar regulations. *Id.* at 296-97. It also recognized that the city's own secondary effects findings—unaided by extrinsic evidence—are sufficient in the absence of specific reason to doubt them. *Id.* at 297-98. Finally, the Court rejected the idea that empirical analysis or academic studies are required for establishing a substantial government interest under *O'Brien*, holding that the government has a "freer hand" when regulating conduct. 529 U.S. at 299-300.

Finally, in *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002), the Court applied *Renton* analysis to a unique zoning regulation prohibiting the combination of adult bookstore and adult arcade operations under one roof. The city contended that such combinations would have the same zoning-type secondary effects as the city had found, in an earlier study, to be associated with separate sexually oriented businesses clustered in a neighborhood. 535 U.S. at 430-31.

Los Angeles—which relied *solely* on its 1977 zoning study—admitted that it did not study the effects of "any separate-standing adult bookstore or arcade," let alone any "combination" establishments. *Id.* at 436.

Although the lower courts granted summary judgment against the city for lack of specific evidence concerning "combination" businesses, this Court reversed, holding that the circuit court erred in "refus[ing] to allow the city to draw the inference that 'the expansion of an adult bookstore to include an adult arcade would increase' business activity and produce the harmful secondary effects" identified in the city's zoning study. *Id.* at 436-37 (quoting 222 F.3d 719, 726 (9th Cir. 2000)). The Court also explained that while a city must provide evidence supporting its own rationale, the city "does not bear the burden of providing evidence that rules out" alternative theories of secondary effects. *Alameda Books*, 535 U.S. at 437 ("The Court of Appeals simply replaced the city's theory . . . with its own . . . .").

*Alameda Books* clarifies that the latitude given cities to address secondary effects allows reliance on evidence of harm not directly on point with the regulation adopted, but nevertheless supportive of an inference justifying the regulation. It was in this context of relying on an inference that the plurality introduced a burden-shifting procedure—not to "appraise the wisdom of the City's decision," *Renton*, 475 U.S. at 52, but only to ensure that "the municipality meets the [reasonably believed to be relevant] standard set forth in *Renton*." *Alameda Books*, 535 U.S. at 438-39.

Justice Kennedy's concurrence stressed that a city cannot advance a content-based rationale, *i.e.*, that the city will reduce secondary effects because its regulation will force the closure of one or more adult businesses. *Id.* at 450-51. Rather, a city must

"advance some basis to show that its regulation has the purpose and effect of suppressing secondary effects, while leaving the quantity and accessibility of speech substantially intact." *Id.* at 449. This is the "proposition [that] a city need[s] to advance in order to sustain a secondary-effects ordinance." *Id.*

Justice Kennedy agreed with the plurality that the city's inference, drawn from its zoning study, was reasonable. *Id.* at 450-52. He emphasized that cities need only rely on some evidence "reasonably believed to be relevant" when reaching legislative judgments concerning secondary effects, acknowledging that city councils are in a better position than the courts to make policy decisions affecting their municipalities. *Id.*

The Eleventh Circuit faithfully applied these precedents in the opinion below when it ruled, as a matter of law, that the City's nudity ordinances serve a substantial governmental interest. It properly evaluated all the evidence under the *Alameda Books* framework to ensure that the City relied on evidence "reasonably believed to be relevant" to the secondary effects the ordinances seek to address. Consistent with this Court's on-point decisions in *Barnes* and *City of Erie*, the Eleventh Circuit held that the City's extensive legislative record and its rationale of preventing illicit sexual behavior and other secondary effects satisfied the *O'Brien / Renton* standard.

Conspicuously, Daytona Grand does not argue that even one legal principle on which the Eleventh Circuit based its decision is contrary to or inconsistent with what Daytona Grand insists is this Court's supposedly

fractured and confusing jurisprudence. Daytona Grand's arguments against the ruling below consist of alleged misapplication of a properly stated rule of law and are therefore an inappropriate basis for granting certiorari. *See* United States Supreme Court Rule 10.

Ignoring this fatal defect in its petition, Daytona Grand contends that "a number of courts have devoted substantial portions of their opinions just trying to decipher what these split decisions mean." App. 8 (citing cases). Daytona Grand's claim conflates analysis with confusion. In each of the cited opinions, the various courts simply proceed, as required, to discern the holding of a plurality decision of this Court under *Marks v. United States*, 430 U.S. 188 (1977) (explaining that the holding of a plurality decision may be viewed as that position taken by those justices who concur in the judgment on the narrowest grounds). In each of those cases, the courts perform the same analysis under *Marks* and arrive at the same conclusions as to which of this Court's opinions constitute the holding of a plurality decision. Indeed, in the opinion below, the Eleventh Circuit demonstrates that, in those same cases in which Daytona Grand claims courts struggled to decipher this Court's meaning, all the courts reached the same conclusion. App. 31 n.19.

Notwithstanding Daytona Grand's claim of confusion, lower courts have carefully followed this Court's precedents and have reached consistent results regarding regulation of nude conduct in sexually oriented businesses. *See, e.g.*, *SOB, Inc. v. County of Benton*, 317 F.3d 856 (8th Cir. 2003) (rejecting adult business's challenge to nudity regulation). Because all

the circuit courts concur with the Eleventh Circuit's findings as to this Court's holdings in plurality opinions, Daytona Grand's claim of "significant confusion" on this point is demonstrably incorrect.

### B. DAYTONA GRAND HAS NOT IDENTIFIED ANY CIRCUIT SPLIT EMANATING FROM THE OPINION BELOW.

Just as Daytona Grand's petition fails to identify any important federal question in the opinion below that either conflicts with relevant decisions of this Court or that has not been settled by this Court, it also fails to identify a circuit split. In fact, most of the issues on which Daytona Grand attempts to manufacture a circuit split are not even implicated in the decision below.

The first issue on which Daytona Grand maintains a circuit split exists is "the weight to be given recent local scientific studies as compared to anecdotal accounts or reports compiled many years ago in other jurisdictions." Pet. 12. The reason Daytona Grand does not cite the opinion below as creating a split on this issue is that the Eleventh Circuit gave Daytona Grand's two expert studies all the weight they deserved. After extensively analyzing those studies, the Eleventh Circuit found them, by their own terms, flatly insufficient as a matter of law because the

> Data relied on by both studies may substantially undercount incidents of many of the types of crime that the City sought to reduce; the data that the studies did analyze show some statistically significant correlations

> between adult theaters and increased criminal activity; and the studies completely fail to address evidence of increased urban blight and decay that the City reasonably relied on when enacting Ordinance 03-375. Thus, [Daytona Grand] has failed to cast direct doubt on all of the evidence that the City reasonably relied on when enacting the challenged ordinances.

App. 58-59. In short, the Eleventh Circuit upheld the ordinances not because it gave undue weight to the City's allegedly "anecdotal" evidence, but rather because Daytona Grand's experts' studies were simply unreliable, incomplete, and actually supported part of the City's rationale for its ordinances.

In lieu of the decision below, Daytona Grand maintains that *Commonwealth of Kentucky v. Jameson*, 215 S.W.3d 9 (Ky. 2006), created a circuit split on this issue. Pet. 13-15. As noted, this Court denied a strikingly similar petition for writ of certiorari making the same claim of a circuit split in that very case on October 1, 2007. *See* No. 06-1697.

The second issue on which Daytona Grand maintains a circuit split exists is "whether the generally relied-upon secondary effects reports examining adult bookstores and live entertainment venues can be used to justify regulations of 'take-out' only facilities where there is no viewing of adult entertainment on the premises." Pet. 18. Here, of course, Daytona Grand describes its establishment as an adult cabaret that has featured live exotic dance performances in a barroom setting since October 2000. Pet. 2-3. Since Daytona Grand admits that it features

live entertainment and does not operate a so-called "take out" establishment, this Court could not address any alleged circuit split on that issue through this case.

Similarly, Daytona Grand alleges a conflict among the circuits on "whether secondary effects can justify a government interest in regulating a *single* instance of expressive activity." Pet. 18. Again, Daytona Grand's establishment has regularly featured live exotic dance performances in a barroom setting since October 2000. Pet. 2-3. Therefore, the constitutionality of regulating a single performance is not at issue in this case.

Next, Daytona Grand alleges a split of authority on whether the court may consider only the secondary effects evidence the government adduces prior to passing the regulation or whether it may also consider post-enactment evidence. Pet. 23-25. Ironically, Daytona Grand concedes that this Court has held that "a governmental interest need not be identified at the time of enactment of a regulation, but may be established later during litigation." Pet. 24 (citing *Barnes*, 501 U.S. at 582). There can be no circuit split on a point of law this Court has already proclaimed. In any case, the Eleventh Circuit considered only the City's preenactment evidence in its legislative record and found that Daytona Grand had failed to cast direct doubt on it; therefore, the Eleventh Circuit did not examine the City's post-enactment evidence. App. 59 n.35. Therefore, this case is not the appropriate vehicle for this Court to address any such issue.

Daytona Grand argues that the Eleventh Circuit created a circuit split by holding that "a City is not required to justify its ordinances with empirical evidence or scientific studies." Pet. 15. There is no circuit split on this point because the Eleventh Circuit's holding derives directly from relevant decisions of this Court. As this Court has held, "legislation seeking to combat the secondary effects of adult entertainment need not await localized proof of those effects." *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 584 (Souter, J., concurring in judgment) (following *Renton*, 475 U.S. 41, 51-52)). Indeed, as the Ninth Circuit has noted, "[a]ll five Justices in the *Alameda Books* majority affirmed *Renton's* core principle that local governments are not required to conduct their own studies in order to justify an ordinance designed to combat the secondary effects of adult businesses. *See Alameda Books*, 535 U.S. at 438 (plurality opinion); *id.* at 451 (Kennedy, J., concurring)." *World Wide Video of Washington, Inc. v. City of Spokane*, 368 F.3d 1186, 1193 (9th Cir. 2004). To whatever extent some other court may have required the government to support its rationale with scientific or empirical evidence, it is contrary to existing precedent. Daytona Grand cannot create a split of authority on the back of an opinion, if there is one, so obviously contrary to governing law.

Furthermore, Daytona Grand argues that the Eleventh Circuit created a circuit split by finding that the studies and opinion of Daytona Grand's expert witness, Daniel Linz, "were insufficient to overcome 'common sense', the experiences of other cities and 'city officials' local knowledge'." Pet. 19. Daytona Grand claims the Eleventh Circuit's rejection of Linz creates

a circuit split with *Abilene Retail #30, Inc. v. Board of Comm'rs of Dickinson County, Kan.*, 492 F.3d 1164 (10th Cir. 2007), in which the Tenth Circuit determined that an allegedly similar study by Linz was sufficient to cast doubt on the county's secondary effects evidence. Pet. 20. The Tenth Circuit's holding does not create a circuit split resolvable by Daytona Grand's petition because, *inter alia*, the Tenth Circuit's decision is contrary to this Court's precedents that have uniformly rejected Linz's testimony.

In *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000), Dr. Linz submitted, as an appendix to an *amicus* brief filed by adult business lawyers, a paper attacking several secondary effects studies relied upon by legislative bodies on the ground that they did not meet the standards set forth in *Daubert*. *See* Brief and Appendix of First Amendment Lawyers Association, 1999 WL 805047, *20 (noting that according to Dr. Linz's attached paper, "absolutely none of the studies that purport to find such a connection [between sexually oriented businesses and secondary effects] have been conducted with methodology sound enough" to satisfy *Daubert*).

In *City of Erie*, Justice O'Connor's plurality noted the city council's legislative findings—which were unsupported by any evidence in the record—were to be treated as "expert judgment" that "should be credited." 529 U.S. at 298. The plurality then addressed Dr. Linz's paper: "And the study relied on by *amicus curiae* does *not cast any legitimate doubt* on the Erie city council's judgment about Erie. See Brief for First Amendment Lawyers Association as *Amicus Curiae* 16-23." *Id.* (emphasis supplied).

Later, in addressing the dissenting opinion that empirical proof should be required, the plurality again referenced Dr. Linz's paper and stated that the Court had "flatly rejected" the idea "that the 'invocation of academic studies said to indicate' that threatened harms are not real is insufficient" in the legislative context. *Id.* at 300 (quoting *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 394 (2000) (rejecting First Amendment challenges to campaign finance regulations)).

In *Alameda Books*, the plurality—again over a dissent *and* a Linz paper submitted with an *amicus* brief, *see* 2001 WL 950921—*rejected* a requirement of empirical evidence and emphasized that when challenging whether *Renton's* deferential standard has been met, the challenger must address "the *municipality's* rationale," not an alternative rationale imposed by an industry witness. 535 U.S. at 437-39.

Dr. Linz does not dispute *any* of the facts recited in *any* of the studies, only the conclusions to be drawn from them. Because he applies a different standard—one much higher than the Supreme Court requires—he rejects any reliance on any study that finds secondary effects. However, the purpose of *Alameda Books* burden-shifting is simply to ensure that the Board "meets the standard set forth in *Renton*," *id.* at 439, not *Daubert* or Dr. Linz's idiosyncratic permutation of that standard. By accepting Dr. Linz's testimony as sufficient to cast direct doubt on the county's rationale for its ordinance in *Abilene Retail*, the Tenth Circuit contravened this Court's precedent.

Finally, Daytona Grand argues that there is a circuit split on whether the requirement to wear G-strings and pasties is the maximum requirement a government can use to regulate erotic dancing. Pet. 29. As an initial matter, Daytona Grand ignores the fact that erotic dancers in Daytona Beach can strip all the way down to their pasties and G-strings in legally established adult theaters more than 500 feet from alcohol establishments.

Second, Daytona Grand fails to show any error of law in the Eleventh Circuit's decision. Under intermediate scrutiny, a requirement is narrowly tailored "so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989). Provided "the means chosen are not substantially broader than necessary to achieve the government's interest, the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative." *Id.* at 800. Under this analysis, this Court has upheld similar regulations of nudity in alcohol beverage establishments. *See New York State Liquor Authority v. Bellanca*, 452 U.S. 714, 714 n.1 (1981) (upholding regulation requiring coverage of the *entire* portion of the female "breast below the top of the areola, or any simulation thereof").

Here, the Eleventh Circuit correctly held that the City's nudity ordinances are narrowly tailored because their purpose of decreasing adverse secondary effects would be achieved less effectively absent the regulation. App. 62-63. As the district court held,

given the City's extensive evidence that alcohol consumption in adult theaters creates secondary effects, the ordinance's buffer requirement reflects a reasonable, and constitutionally permissible, attempt to address such secondary effects. In addition, the regulation leaves dancers ample capacity to convey their erotic message. As the district court found in its summary judgment order, there is simply no indication that a buffer, which has the aim of deterring customers from drinking alcohol in or around adult businesses, has any effect whatsoever on the dancers' erotic message. *See City of Erie*, 529 U.S. at 301 (citing *Barnes*, 501 U.S. at 587 (1991) (Souter, J., concurring in judgment) (noting that a "dancer's remaining capacity and opportunity to express the erotic message" includes doing so "by articulate speech or representational means; a pornographic movie featuring one of respondents, for example, was playing nearby without any interference from the authorities at the time these cases arose.")).

Daytona Grand argues that the Eleventh Circuit's ruling on this point is contrary to this Court's proclamation that G-strings and pasties are the maximum permissible regulation of nude dancing under the First Amendment. Pet. 29. In *City of Erie*, Justice O'Connor noted that

> The ordinance regulates conduct, and any incidental impact on the expressive element of nude dancing is *de minimis*. The requirement that dancers wear pasties and G-strings is a minimal restriction in furtherance of the asserted government interests, and the restriction leaves ample capacity to convey the

> dancer's erotic message. *See Barnes v. Glen Theatre, Inc.*, 501 U.S. at 572 (plurality opinion of REHNQUIST, C. J., joined by O'CONNOR and KENNEDY, JJ.); 501 U.S. at 587 (SOUTER, J., concurring in judgment).

529 U.S. at 301. This holding does not mean, as Daytona Grand argues, that the government interest in prohibiting public nudity is met as soon as a performer is wearing pasties and G-strings. Pet. 29. To be sure, pasties and a G-string is the least restrictive amount of covering that can prevent nudity, and the Court therefore deemed it *de minimis*. But the *Erie* Court's statement that the pasties and G-string requirement "leaves ample capacity to convey the dancer's erotic message" does not mean that a nudity regulation must leave the exact same amount of flesh uncovered. Such a construction would be inconsistent with *Ward's* recognition that regulations of expressive conduct are constitutional "so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." 491 U.S. at 799. Moreover, such a construction would leave cities unable to address documented secondary effects associated with nearly-nude dancing in sexually oriented businesses.

The only case Daytona Grand cites as creating a circuit split on this issue is *R.V.S. v. L.L.C. v. City of Rockford*, 361 F.3d 402 (7th Cir. 2004). That case is completely inapposite. In that case, the city had an ordinance regulating sexually oriented businesses such as adult theaters, but that ordinance was not at issue in the lawsuit. *Id.* at 404. Rather, the lawsuit concerned a separate and more general ordinance that

was so broad that it could have regulated erotic dancing by even *fully clothed* performers in any business establishment, not merely in sexually oriented businesses. Because the city enacted that ordinance without any preamble, findings, legislative record, or supporting evidence tying the ordinance to prevention of secondary effects, *id.* at 405, the Seventh Circuit found that the city failed to present any justification why it was essential to regulate such a wide universe of dance. Accordingly, the Seventh Circuit ruled the ordinance unconstitutional. *Id.* at 411-12, 416.

Here, by sharp contrast, Daytona Beach has enacted a much more limited ordinance that, in the face of extensive evidence that the combination of alcohol and nudity exacerbates adverse secondary effects, merely requires erotic dancers who perform within 500 feet of an alcohol establishment to wear slightly more covering than pasties and G-strings. Therefore, the Seventh Circuit's decision in *R.V.S.* does not create a circuit split with the Eleventh Circuit's decision below.

## CONCLUSION

The decision below is faithful to, and a straightforward application of, this Court's on-point precedents. It presents no novel question of law warranting the granting of Daytona Grand's petition for a writ of certiorari. This case is not the genesis of any lower-court conflict, and Daytona Grand's identification of extraneous (alleged) conflicts does not make this case the proper vehicle for resolution of issues that this case does not raise. For the foregoing

reasons, the City of Daytona Beach respectfully urges the Court to deny the petition.

Dated: January 9, 2008

Respectfully submitted,

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